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Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2014 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 21, 2014. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 21, 2014.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2014 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2014 supplement pamphlets and in the bound volumes of the Code.

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TITLE 13

CONTRACTS

Chap.

CHAPTER 1

GENERAL PROVISIONS

Sec.

13-1-1. Contract defined — Generally.

JUDICIAL DECISIONS

Lack of maturity date or interest rate for a loan was not fatal. — Trial court erred in granting summary judgment to a brother on his sister's claim for repayment of $132,700 she allegedly lent him, with no interest rate or time for repayment specified, following her sale of her business that employed him. The lack of an interest rate and time for repayment was not fatal to the claim. Thomas v. Chance, 325 Ga. App. 716, 754 S.E.2d 669 (2014).

13-1-6. Contract defined — Parol contracts.

Cross references. — Parol evidence generally, T. 24, C. 3.

13-1-8. Contract defined — Entire and severable contracts.

Law reviews. — For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Severable Contracts

General Consideration

Cited in Penso Holdings, Inc. v. Cleveland, 324 Ga. App. 259, 749 S.E.2d 821 (2013).

Severable Contracts

Causes of action accrue from time to time as services rendered under severable contract.

Because the arbitration agreements contained a central promise, favored by federal law, to arbitrate their employment agreement, and an ancillary agreement to initiate arbitration claims within a year, the court inferred from the nature and structure of the agreement that the parties intended for the promises to be separate, so the agreement to arbitrate was severable from the agreement to initiate arbitration within a year, and on this basis the agreements between the parties to arbitrate the dispute had to be enforced unless there was an independent state law basis for refusing to enforce the contract. Zulauf v. Amerisave Mortg. Corp., No. 1:11-cv-1784-WSD, 2011 U.S. Dist. LEXIS 156699 (N.D. Ga. Nov. 23, 2011).

13-1-11. Validity and enforcement of obligations to pay attorney's fees upon notes or other evidence of indebtedness.

(a) Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectable as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to subsection (b) of this Code section and to the following provisions:

(1) If such note or other evidence of indebtedness provides for attorney's fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness;

(2) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness and 10 percent of the amount of principal and interest owing thereon in excess of $500.00; and

(3) The holder of the note or other evidence of indebtedness or his or her attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten

days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(b)(1) If, in a civil action, application of the provisions of paragraph (2) of subsection (a) of this Code section will result in an award of attorney's fees in an amount greater than $20,000.00, the party required to pay such fees may, prior to the entry of judgment, petition the court seeking a determination as to the reasonableness of such attorney's fees.

(2) In response to a petition filed under paragraph (1) of this subsection, the party requesting the attorney's fees shall submit an affidavit to the court with evidence of attorney's fees, and the party required to pay such fees may respond to such affidavit.

(3) The court may hold a hearing to decide the matter of attorney's fees or may award attorney's fees based on the written evidence submitted to the court. The amount of attorney's fees awarded shall be an amount found by the court to be reasonable and necessary for asserting the rights of the party requesting attorney's fees.

(4) This subsection shall not apply to a party against whom a default judgment is to be entered pursuant to Code Section 9-11-55.

(5) A civil action instituted solely for the purpose of invoking this subsection shall be void ab initio.

(c) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to this Code section where applicable.

(d) The provisions of this Code section shall not authorize the recovery of attorney's fees in any tort claim. (Ga. L. 1890-91, p. 221, § 1; Civil Code 1895, § 3667; Ga. L. 1900, p. 53, § 1; Civil Code 1910, § 4252; Code 1933, § 20-506; Ga. L. 1946, p. 761, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 545, § 1; Ga. L. 1957, p. 264, § 1; Ga. L. 1968, p. 317, § 1; Ga. L. 2010, p. 878, § 13/HB 1387; Ga. L. 2012, p. 1035, § 1/SB 181.)

The 2012 amendment, effective July 1, 2012, inserted "subsection (b) of this Code section and to" near the end of the introductory language of subsection (a); added present subsection (b); redesignated former subsection (b) as present subsection (c); and added subsection (d). See editor's notes for effective date and applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, in subsection (d), "Code" was inserted before "section" and "attorney's" was substituted for "attorneys".

Editor's notes. — Ga. L. 2012, p. 1035, § 3/SB 181, approved by the Governor May 2, 2012, provided that the effective date of the amendment to this Code section is July 1, 2011, and that the amendment of this Code section applies to contracts entered on or after July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date and applicability provisions that precede the date of approval by the Governor.

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Constitutionality. — Supreme Court of Georgia held that O.C.G.A. § 13-1-11 bears a rational relationship to the purpose for which the statute was intended, namely to provide debtors with the opportunity to avoid the contractual obligation to pay the creditor's attorney fees by allowing the debtor a last chance to pay the balance of the debt and avoid litigation. Austin v. Bank of Am., N.A., 293 Ga. 42, 743 S.E.2d 399 (2013).

Defenses to collection action. — Bank was entitled to collect upon the indebtedness of a defaulted loan because the evidence did not support either of the defenses of estoppel or breach of an implied duty of good faith and fair dealing in opposition to the bank's collection claims. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

Section valid. — Court found no error in the district court's rejection of the company's contention that the attorney's fees provision was an unenforceable penalty; the 15% provisions was permitted under O.C.G.A. § 13-1-11, and was not an unenforceable liquidated damages penalty. Branch Banking & Trust Co. v. Lichty Bros. Constr., Inc., No. 12-11639, 2012 U.S. App. LEXIS 18418 (11th Cir. Aug. 30, 2012) (Unpublished).

Conditions Precedent to Recovery of Attorney's Fees

Conditions precedent, etc.

Because all defendants received notice of the bank's intent to enforce the "Collection Costs and Attorney's Fees" provision of a delinquent note and were given ten days to pay in full, the bank was entitled to attorney's fees and costs as allowed under O.C.G.A. § 13-1-11 in the amount of 15% of the total principal and accrued interest as of the date of judgment. Bank of Ozarks v. Kingsland Hospitality, LLC, No. 4:11-cv-237, 2012 U.S. Dist. LEXIS 144666 (S.D. Ga. Oct. 5, 2012).

Proper demand notice, etc.

Trial court properly granted the lender summary judgment and awarded the lender attorney fees pursuant to O.C.G.A. § 13-1-11 in a mortgage foreclosure action because the borrower failed to satisfy the matured principal and interest due on the delinquent payments within 10 days of any of the demand letters; consequently, after the expiration of 10 days, the borrower's total obligation included the matured principal and interest obligation as well as attorney fees under § 13-1-11.

Austin v. Bank of Am., N.A., 293 Ga. 42, 743 S.E.2d 399 (2013).

Application

Debt collection suit involving credit card. — In a debt collection suit, a bank was properly granted summary judgment against a credit cardholder because, despite the cardholder signing the cardholder agreement while part of a corporation, the agreement clearly provided that the credit cardholder was individually and personally liable for the outstanding debt and the bank had provided the requisite notice for the collection of attorney fees. Grot v. Capital One Bank (USA), N. A., 317 Ga. App. 786, 732 S.E.2d 305 (2012).

Provision of lease agreement enforceable.

Trial court did not err in awarding attorney fees and expenses to landlords because the landlords prevailed in a tenant's breach of contract action; pursuant to the tenant's lease agreement, the "prevailing party" in any litigation to enforce a right or collect sums due under the lease could recover reasonable attorney fees and litigation expenses, and the trial court awarded fees and expenses after concluding that the landlords were the prevailing parties. Office Depot, Inc. v. Dist. at Howell Mill, LLC, 309 Ga. App. 525, 710 S.E.2d 685 (2011).

Applies to commercial lease.

Term "evidence of indebtedness" in O.C.G.A. § 13-1-11 applied to a commercial lease and limited the landlord's recovery of attorney's fees, even though the lease provided that the landlord was entitled to recover all attorney's fees incurred, and the landlord in this case had a contingency fee agreement with the landlord's counsel. Best v. CB Decatur Court, LLC, 324 Ga. App. 403, 750 S.E.2d 716 (2013).

Award vacated. — Trial court award of attorney fees under O.C.G.A. § 13-6-11 to a bank was reversed on appeal since the appellate court determined that summary judgment should not have been granted to the bank as a result of genuine issues of fact existing as to the interpretation of the contract at issue. DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013).

Calculation of Attorney's Fees

Contract for fees.

In a lender's suit to enforce personal guaranties, the guarantor pointed to no evidence to create a genuine fact dispute as to the amount due, and the lender was entitled to attorney's fees based on the attorney's fees provision in the floorplans. Nissan Motor Acceptance Corp. v. Sowega Motors, Inc., No. (CDL), 2012 U.S. Dist. LEXIS 128854 (M.D. Ga. Sept. 11, 2012).

Trial court erred in failing to reduce attorney fees awarded by jury. — Trial court erred in failing to reduce the amount of attorney fees a jury awarded a lessor pursuant to O.C.G.A. § 13-1-11 because the jury found that lessees owed $103,954 in unpaid rent under the lease contract and awarded the lessor $67,734 in attorney fees, but under § 13-1-11(a)(1), the maximum recovery under the lease, where the principal owing had been found to be $103,954, was limited to 15 percent of that amount, or $15,593. Level One Contact, Inc. v. BJL Enters., LLC, 305 Ga. App. 78, 699 S.E.2d 89 (2010).

Bankruptcy Proceedings

Applicability of section to Chapter 13 bankruptcy plan.

Bankruptcy court's conclusion that appellee debtors did not file the debtor's bankruptcy actions in bad faith was not an abuse of discretion because: (1) it was not a single asset case; (2) the case was not just a dispute between appellant creditor and appellees; (3) appellees did not have employees; and (4) at the time of filing, appellees were each in financial distress and filed for bankruptcy for the legitimate purposes of preserving equity and allowing for an orderly distribution of the debtor's property to creditors. Contrary to appellant's argument, appellees did not file for bankruptcy solely to avoid paying statutory attorney's fees pursuant to O.C.G.A. § 13-1-11. First Bank of Ga. v. Lamb (In re Lamb), No. 112-011, 2012

U.S. Dist. LEXIS 74158 (S.D. Ga. May 29, 2012).

Notice

1. In General

If plaintiff fails to give proper notice, recovery of attorney's fees is unauthorized.

In an adversary case in which a creditor moved for the entry of a default judgment and sought attorney's fees and costs, while the contract between the creditor and the debtor might provide for payment of the creditor's attorneys' fees and costs, there was no evidence that the creditor complied with the notice requirements of O.C.G.A. § 13-1-11(a)(3). Springleaf Fin. Servs. v. Warner (In re Warner), No. 12-5654, 2013 Bankr. LEXIS 2236 (Bankr. N.D. Ga. Apr. 30, 2013).

4. Timing of Notice

Separate notice in writing after maturity required. — Trial court erred by awarding the creditors attorney fees pursuant to a promissory note because the debt instruments themselves, including the promissory note, the note modification, and the personal guarantee did not satisfy the notice requirement of O.C.G.A. § 13-1-11(a)(3); the statute plainly requires a separate notice in writing after maturity. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Effect of stay in bankruptcy on sending of demand letter.

Bank did not have an allowable claim for the bank's contractual attorney fees in a bankruptcy case because the bank did not provide the debtor with the 10-day notice prior to the petition date; any effort to perfect the right to receive contractual attorney fees would have violated the automatic stay. However, because the allowance of fees under bankruptcy law was applied without reference to state law, the bank was entitled to reasonable fees, even if the contractual provision providing for such was unenforceable under state law. In re Putnal, 2013 Bankr. LEXIS 4807 (Bankr. M.D. Ga. Nov. 12, 2013).

5. Content and Form of Notice

Inadequate, misleading, and insufficient notice. — Trial court erred by awarding the creditors attorney fees pursuant to a promissory note because the creditors failed to provide the debtor and the guarantor sufficient and timely notice of the creditors intent to pursue such fees, as required by O.C.G.A. § 13-1-11(a)(3); the demand letters did not satisfy the requirement because the letters did not state that the guarantor could avoid the guarantor's obligation to pay attorney fees by curing the guarantor's default within ten days of the notice, as required by the statute, and the complaint itself did not satisfy the notice requirement because the complaint incorporated a deficient demand letter, which did not cure the letter's lack of notice, and rather than notifying the guarantor that the guarantor had an opportunity to avoid paying attorney fees by timely curing the default, the complaint stated the opposite, i.e., that the creditors were entitled to recover reasonably incurred attorneys' fees. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Language in a landlord's complaint asserting that notice of intent to collect attorney's fees under O.C.G.A. § 13-1-11 had been given to the tenant was not only insufficient to notify the tenant that the tenant had an opportunity to avoid paying attorney fees by timely curing the default, but the notice actually stated the opposite, i.e., that the landlord was entitled to the attorney's fees; therefore, the notice was inadequate. Best v. CB Decatur Court, LLC, 324 Ga. App. 403, 750 S.E.2d 716 (2013).

6. Substantial Compliance

Substantial compliance with notice requirement is condition precedent to collection of attorney fees.

By the terms of O.C.G.A. § 13-1-11(a), compliance with that Code section is a statutory prerequisite to collecting an otherwise valid obligation to pay attorney fees incurred in the collection on a note; if the debtor cures the debt in compliance with the requisite ten-day notice period, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement, O.C.G.A. § 13-1-11(a)(3), which is true as a matter of statutory law, regardless of whether the

parties agreed to such a ten-day grace period and, therefore, O.C.G.A. § 13-1-11(a)(3) creates a mandatory condition precedent to the debtor's obligation to pay attorney fees expended by the lender while collecting on a note. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Sufficient notice given.

Trial court did not err in granting a corporation's motion for summary judgment on the corporation's claim for attorney fees under O.C.G.A. § 13-1-11 on the damages a jury awarded the corporation in the corporation's suit against a textile company for anticipatory breach of contract because there was no genuine issue of material fact as to whether the demand letter the corporation issued to the textile company was defective under § 13-1-11 since the demand letter substantially complied with § 13-1-11 by setting forth the face value of the unpaid debt obligation, $2 million, even if the corporation ultimately could recover somewhat less than that amount after a jury calculated the present value; the textile company's full payment obligations have matured, and upon the textile company's anticipatory breach of the parties' agreement, the corporation was entitled to issue a demand for the face value of the total remaining unpaid debt, $2 million, prior to the entry of judgment on the indebtedness. Textile Rubber & Chem. Co. v. Thermo-Flex Techs., Inc., 308 Ga. App. 89, 706 S.E.2d 728 (2011).

7. Pleadings

One seeking recovery of attorney's fees bears burden of showing valid notice.

When a creditor was not entitled to a default judgment in the creditor's lawsuit alleging that the debtor's credit card debt was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) because the complaint did not contain sufficient factual allegations showing fraud, false pretenses, or false representations by the debtor as to the credit card debt, the creditor was also not entitled to default judgment on the creditor's claim for attorneys' fees because the complaint did not show that the creditor gave 10 days written notice of the creditor's intent to enforce the credit card's attorneys' fees provision as required by O.C.G.A. § 13-1-11(a)(3). Am. Express Centurion Bank v. McGloster (In re McGloster), No. 12-05664, 2013 Bankr. LEXIS 2237 (Bankr. N.D. Ga. Apr. 30, 2013).

13-1-13. Recovery of voluntary payments.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Section inapplicable where payment induced by misplaced confidence, artifice, deception or fraud of party paid.

In an action by borrowers claiming that the lender's charging of an illegal notary fee breached the parties' loan agreement, the district court erred in concluding that, regardless of whether a breach occurred, O.C.G.A. § 13-1-13 barred recovery because Georgia's Supreme Court, in response to a certified question, concluded that the borrowers had alleged sufficient artifice, deception, or fraudulent practice to trigger an exception to § 13-1-13. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318 (11th Cir. 2010).

Voluntary Payments

Right to recoup taxes forfeited. — Superior court did not err in reversing the decision of the Georgia Department of Revenue that a corporate officer was liable for a restaurant's sales and use taxes pursuant to O.C.G.A. § 48-2-52 because the release of and refund payment to the majority owner of the restaurant operated

as a release of the officer; under O.C.G.A. § 13-1-13, by voluntarily paying the owner a settlement amount with full awareness of any potential joint claim the owner had against the officer, the Department forfeited any right the Department had to recoup from the officer the payment the Department made to the owner. Ga. Dep't of Revenue v. Moore, 317 Ga. App. 31, 730 S.E.2d 671 (2012).

Doctrine does not apply to tax indebtedness. — In an assessment action under O.C.G.A. § 48-2-52, the Georgia Court of Appeals erred by concluding that because the Georgia Department of Revenue voluntarily refunded a tax payment made by a majority owner of a restaurant, it could not seek payment from a second responsible party as the voluntary payment doctrine applied to contracts, not tax indebtedness; it was necessary to remand the case to see if the second responsible party was a necessary party to the majority owner's refund action. Ga. Dep't of Revenue v. Moore, 294 Ga. 20, 751 S.E.2d 57 (2013).

Voluntary payment doctrine set forth in O.C.G.A. § 13-1-13 is a concept applicable to contracts, not tax indebtedness. Ga. Dep't of Revenue v. Moore, 294 Ga. 20, 751 S.E.2d 57 (2013).

Subrogee's claim barred.

Trial court did not err in granting a contractor summary judgment in an insurer's action to recover for the property damage a church sustained when the contractor installed an air conditioning system because the action was barred by the voluntary payment doctrine since the insurer paid the church for the church's loss and had no contractual obligation to do so, and under the church's policy, the insurer could not recover for a loss against a third party unless the loss was paid under the covered property coverage; prior to paying the church, the insurer had full knowledge of the facts pertaining to the loss, having received several reports from an adjuster, and the fact that the insurer had an assignment did not change the result because it was trying to recover the same amount from the contractor that the insurer paid for the loss. Southern Mut. Church Ins. Co. v. ARS Mech., LLC, 306 Ga. App. 748, 703 S.E.2d 363 (2010).

Voluntary payment doctrine not a bar to recovery of excessive notary charges. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that the voluntary payment doctrine of O.C.G.A. § 13-1-13 did not bar a breach of contract claim based on the excessiveness of the charges, as there was sufficient artifice, deception, or fraudulent practice by the mortgagee's misrepresentation under O.C.G.A. § 45-17-11(d) that the charges were "reasonable and necessary." Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

13-1-14. Collection of closing fees for contracts for the advance of money or the extension of credit; refund of closing fees in certain instances; limited application.

(a) In addition to any other charges permitted for the advance of money or for the extension of credit, a lender or seller may collect a closing fee at the time of making a loan or extending credit in order to defray the costs of investigation and verification of a borrower's or purchaser's credit reports and references. Such closing fee may be for an amount up to 4 percent of the face amount of the loan or credit extension or total amount of the sales contract but shall not be more than $50.00. Such closing fee may be paid from the proceeds of the amount borrowed or added to the principal amount of the loan or credit extension.

(b) When any loan or sales contract upon which a closing fee has been charged is prepaid in full by any means within 90 days of the date of the loan or sales contract, the lender or seller shall refund or credit the borrower or purchaser with a pro rata portion of the closing fee; provided, however, that in such event, the lender or seller may retain an amount of not more than $25.00 from the collected closing fee.

(c) This Code section shall only apply to industrial loans made pursuant to Chapter 3 of Title 7, retail installment and home solicitation sales contracts entered into pursuant to Article 1 of Chapter 1 of Title 10, and insurance premium finance agreements entered into pursuant to Chapter 22 of Title 33; provided, however, that a closing fee authorized under this Code section shall not constitute interest, a time price differential, a finance charge, or a service charge within the meaning of Code Section 7-3-15, 10-1-4, or 33-22-9.

(d) Nothing contained in Code Section 7-4-18 shall be construed to amend or modify the provisions of this Code section. (Code 1981, § 13-1-14, enacted by Ga. L. 2013, p. 30, § 1/SB 139.)

Effective date. — This Code section became effective April 9, 2013.

CHAPTER 2

CONSTRUCTION

13-2-1. Construction of contracts by courts generally; findings of fact by juries.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Clayton v. S. Gen. Ins. Co., 306 Ga. App. 394, 702 S.E.2d 446 (2010); MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011); Primary Invs., LLC v. Wee Tender Care III, Inc., 323 Ga. App. 196, 746 S.E.2d 823 (2013).

Ambiguous Agreements

Term "willful" in contract ambiguous and had to be determined by a jury. — Trial court erred in granting a buyer partial summary judgment on the buyer's breach of contract claim against the sellers because the conflicting evidence established that a genuine issue of material fact existed as to whether the sellers defaulted on the option agreement in bad faith and whether the default was willful; as such, a jury must resolve whether the sellers' default was willful, which will determine whether the buyer

could recover damages for breach of contract under the option agreement. Garrett v. S. Health Corp. of Ellijay, Inc., 320 Ga. App. 176, 739 S.E.2d 661 (2013).

Application

Guaranty.

Trial court did not err by finding a guarantor personally liable on a promissory note because the trial court correctly found that the language of the promissory note, the unconditional guaranty, and the modification to the promissory note were unambiguous, and since the documents' provisions were clear, the trial court's proper role was to apply the terms as written; in the guaranty, the guarantor expressly waived all notices or defenses to which the guarantor could be entitled under the guaranty, to the extent permitted by law, and because the guarantor failed to assert any defense based upon an alleged incompetency to enter into a contract at the time the guarantor executed the guaranty, and because the guarantor failed to show that the guaranty's broad waiver of defenses was prohibited by statute or public policy, the guarantor was bound thereby. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Exculpatory clause. — Exculpatory clause in parties' letter of agreement did not explicitly, prominently, clearly, and unambiguously bar breach of contract claims by medical care providers against a network administrator as those claims were outside the scope of the clause. Aetna Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga. App. 641, 746 S.E.2d 148 (2013).

Amendments to pleadings did not negate application of contract. — In a wrongful death and breach of contract action wherein the plaintiff did not prevail, the trial court erred by awarding the plaintiff attorney fees under an aircraft purchase agreement (APA) because the defendant was the prevailing party and under the fee-shifting clause of the agreement, the prevailing party was entitled to an award of attorney fees and plaintiff's amendments to the complaint to remove references relying on the APA for liability did not alter that the APA governed the parties' transaction. Eagle Jets, LLC v. Atlanta Jet, Inc., 321 Ga. App. 386, 740 S.E.2d 439 (2013).

13-2-2. Rules for interpretation of contracts generally.

JUDICIAL DECISIONS

Analysis

General Consideration

1. Application in General

Construction impermissible where language capable of only one reasonable interpretation.

Term "waste" in a royalty fees contract was unambiguous and was properly given the term's plain and ordinary meaning pursuant to O.C.G.A. § 13-2-2(2). Had the parties intended the contract to include solid waste, a term commonly used in the waste management industry, the parties could have inserted the word "solid" before the word "waste," but the parties did not. Wilkening v. Veolia Es Evergreen Landfill, Inc., No. 12-11852, 2012 U.S. App. LEXIS 20502 (11th Cir. Oct. 2, 2012) (Unpublished).

Plain language of contract upheld.

Trial court properly granted a condominium association summary judgment in a premises liability action because interpreting the condominium association documents established that the association did not have a duty to remove snow and ice from the common walkway where the resident fell. Scrocca v. Ashwood Condominium Ass'n, Inc., 756 S.E.2d 308, No. A13A2411, 2014 Ga. App. LEXIS 150 (2014).

Express easement in deed construed. — Subsequent property owner was properly held to have a duty, pursuant to an express easement in a deed, to maintain and repair a sewer line that traversed an adjoining property owner's land because the easement was unambiguous and provided for the maintenance of all sewer lines on the easement, regardless of when the sewer lines were built. Kammerer Real Estate Holdings, LLC v. PLH Sandy Springs, LLC, 319 Ga. App. 393, 740 S.E.2d 635 (2012), overruled on other grounds, 322 Ga. App. 859 (2013).

Forum selection clause.

Trial court erred in granting a debtor's motion to transfer a bank's action alleging breach of a loan agreement and promissory note because the trial court's focus solely on the note and the note's venue clause was in contradiction of O.C.G.A. § 13-2-2(4); the promissory note was a loan document subject to the document protocols that were attached to the loan agreement, and no showing was contained in the record that the forum selection clause in the document protocols was unenforceable. Park Ave. Bank v. Steamboat City Dev. Co., 317 Ga. App. 289, 728 S.E.2d 925 (2012).

Construction of condition precedent in agency contract. — Title insurance company was entitled to judgment as a matter of law on a real estate firm's counterclaim for breach of contract claim because the agency contract as amended in 2004 clearly and unambiguously required the firm to remit 25 percent of the gross title premiums it collected as a condition precedent to the rebate provision, which construction both upheld the plain language of the agreement and comported with common sense. Dewrell Sacks, LLP v. Chi. Title Ins. Co., 324 Ga. App. 219, 749 S.E.2d 802 (2013).

Bad faith not found. — Trial court erred by denying a title company's motion for summary judgment on a lender's claim for coverage under the title insurance policy and for bad faith damages because the policy stated that the title company was liable for the lesser amount of the difference between the value of the insured estate and the value of the insured estate subject to the defect insured against; thus, since the lender received more in the foreclosure sale than the value, the title company was liable for zero. Doss & Assocs. v. First Am. Title Ins. Co., 2013 Ga. App. LEXIS 968 (Nov. 21, 2013).

Cited in S. Point Retail Ptnrs, LLC v. N. Am. Props. Atlanta, Ltd., 304 Ga. App. 419, 696 S.E.2d 136 (2010).

2. Intent of Parties

Intention of parties as controlling factor.

Appellate court granted summary judgment to an estate in a wrongful death suit because after applying the rules of contract construction and considering parol evidence, the parties intended a worker to be a third party beneficiary of the promises made by the construction companies to obtain automobile liability insurance and to ensure the subcontractors did as well. Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 746 S.E.2d 698 (2013).

Arbitration agreement intended to apply to current and former employees. — Trial court did not err by ordering a pilot's employment related claims against the former employer to arbitration because the arbitration agreement clearly and unambiguously applied to disputes involving former employees and was not limited to only current employees. Wedemeyer v. Gulfstream Aero. Corp., 324 Ga. App. 47, 749 S.E.2d 241 (2013).

Parties intended to honor arbitration clause in debt agreement. — Trial court erred by denying a client's motion to compel arbitration of the claim against a debt settlement corporation for violations of the debt adjusting statutes, O.C.G.A. § 18-5-1 et seq., because the arbitration provision in the debt settlement agreement mandated arbitration of all disputes and claims between the parties related to the agreement and the claim that the corporation violated statutes regulating the business of debt adjusting was connected to the debt settlement agreement. Penso Holdings, Inc. v. Cleveland, 324 Ga. App. 259, 749 S.E.2d 821 (2013).

Contingency fee contract. — Ambiguity in a contingency fee contract, regarding whether the client had to pay for paralegal services upon terminating the law firm's services, could not be resolved by applying the rules of contract construction, and the jury had to resolve the issue of what the ambiguous language meant and what the parties intended. Shepherd v. Greer, Klosic & Daugherty, 325 Ga. App. 188, 750 S.E.2d 463 (2013).

4. Jury-Court Determinations

Construction of consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

Summary judgment vacated due to existence of genuine issues of fact on construction of contract. — Trial court erred by granting summary judgment to a bank because genuine issues of fact existed as to the bank's obligations under the loan contract such as whether the bank was not to record the security interests assigned to it except in the event of a default by the borrower, whether the bank breached a duty to cooperate with the borrower in foreclosing on the properties securing the underlying loans, and whether a duty on the bank to endeavor to timely review loan requests was meaningless. DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013).

Parol Evidence

1. In General

Parol evidence inadmissible as against written contract. — Parol evidence is inadmissible to add to, take from, or vary a written contract. Nash v. Twp. Invs., LLC, 320 Ga. App. 494, 740 S.E.2d 236 (2013).

2. Distinct Collateral Oral Agreements

Parol evidence of release from guaranties inadmissible. — Guarantors' claims that the guarantors entered into written agreements with a bank releasing the guarantors from their guaranty agreements was not supported by any evidence; there was nothing to satisfactorily account for the absence of the written agreements, former O.C.G.A. § 24-5-4(a) (see now O.C.G.A. § 24-10-1002), and any oral assurances by bank personnel were inadmissible to vary from the terms of the guaranty agreements under O.C.G.A. § 13-2-2(1). Windham & Windham, Inc. v. Suntrust Bank, 313 Ga. App. 841, 723 S.E.2d 70 (2012).

5. Ambiguous Agreements

Construction of ambiguous physician's services contract. — Interpreting a contract so as to give effect to each provision as required by O.C.G.A. § 13-2-2(4), a court rejected a hospital's argument that the hospital was not obligated under the terms of a physician's services contract to pay the physician during the 60-day period between notice of termination and the termination itself because the interpretation of a provision that the physician would provide services on an as-needed basis as scheduled by the hospital would render meaningless the contract's provisions distinguishing between offenses that were grounds for immediate termination from offenses that were grounds for possible termination if not cured and provisions for termination without cause, all of which had different notice requirements. Chaudhuri v. Fannin Reg'l Hosp., Inc., 317 Ga. App. 184, 730 S.E.2d 425 (2012).

Construction of insurance contract.

Because the Railroad Retirement Act of 1974, 45 U.S.C. § 231 et seq., and Social Security Act, 42 U.S.C. § 301 et seq., were similar, the disability insurance policy's offset provision was not afflicted with any ambiguity, and the district court should not have resorted to canons of construction to determine the unwritten intent of the provision. Duckworth v. Allianz Life Ins. Co. of N. Am., 706 F.3d 1338 (11th Cir. 2013).

6. Admissibility of Circumstances Surrounding Execution

If parties' intentions ascertainable from writing, attendant circumstances inadmissible.

In a breach of contract action, extrinsic evidence was properly set forth in the record explaining an insurance program referenced in the contracts existing before the inception of, and continues to exist independently of, a city's international terminal airport construction project. Archer W. Contrs., Ltd. v. Estate of Pitts, 292 Ga. 219, 735 S.E.2d 772 (2012).

9. Application

Appointment letter not an employment contract. — In a wrongful termination case, the trial court erred by failing to grant the motion for summary judgment filed by a university's board of regents because the employee was at will based on an interpretation of the appointment letter, which did not provide a definite, specific term of employment and stated that the employment was at the pleasure of the president; thus, the employee's termination was not a breach of contract. Freeman v. Smith, 324 Ga. App. 426, 750 S.E.2d 739 (2013).

Parol evidence of oral modification of agreement not admissible. — Because the lease was required by the statute of frauds to be in writing, it could not be modified by an oral agreement, and the trial court did not err in excluding parol evidence of the alleged oral agreements between the parties. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

Effect of merger clauses.

When a guarantor alleged that a lender promised to provide "100% financing" for a new facility, based on a merger clause, the guarantor could not state a claim against the lender for failing to honor an alleged promise that was not memorialized in the written agreement. Nissan Motor Acceptance Corp. v. Sowega Motors, Inc., No. (CDL), 2012 U.S. Dist. LEXIS 128854 (M.D. Ga. Sept. 11, 2012).

Plain language of easement. — Trial court properly entered a temporary restraining order directing that the north entrance to a shopping center be opened instanter because a 2004 easement was clear and unambiguous and provided for full enjoyment of the easement of ingress and egress to the shopping center. Nat'l Hills Exch. v. Thompson, 319 Ga. App. 777, 736 S.E.2d 480 (2013).

Construction of Words

Ordinary meanings.

Applying O.C.G.A. § 13-2-2(2) to interpret the plain language of a commercial lease agreement providing that the tenant was responsible for all expenses for the entire property and building of any nature whatsoever, the court of appeals concluded that the tenant's failure to repair the roof constituted default under this provision. NW Parkway, LLC v. Lemser,

309 Ga. App. 172, 709 S.E.2d 858 (2011), cert. denied, No. S11C1289, 2011 Ga. LEXIS 978 (Ga. 2011).

Construction of term "fixtures" in lease. — Trial court did not err in charging the jury that the jury's duties included construing provisions of the lease governing fixtures because a genuine issue of fact existed as to what that term referred to since the lease was ambiguous as a result of referring to fixtures in one provision and referring to trade fixtures in another. Goody Prods. v. Dev. Auth. of Manchester, 320 Ga. App. 530, 740 S.E.2d 261 (2013).

Construction of "all participants". — In a breach of contract action, the appellate court erred in concluding that a worker killed at a city airport construction site was an intended beneficiary of all of the contracts between the city and the contractors as the court did not properly consider the definition of the term "all participants" and did not consider the parties' contractual obligations separately. Archer W. Contrs., Ltd. v. Estate of Pitts, 292 Ga. 219, 735 S.E.2d 772 (2012).

Preference for Upholding Contracts

Construction upholds the plain language of the parties' agreement. — Based on construction rules under O.C.G.A. § 13-2-2(1) and (4), parties' settlement agreement regarding disputed title to waterfront property required adjoining property owners to make a payment, which was conditioned on the obtaining of necessary permits; in the event the permit contingency failed, the payment was to be returned. Allen v. Sea Gardens Seafood, Inc., 290 Ga. 715, 723 S.E.2d 669 (2012).

Probate court improperly modified settlement agreement. — Probate court erred in ruling on how the estate assets should be distributed among the parties by improperly modifying the terms of the settlement agreement because the unambiguous terms of the settlement agreement required an accountant to complete certain determinations before the equalization of the estate assets could be calculated, and it was undisputed that the accountant had not yet completed those determinations. In re Estate of Hubert, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

Construction Against Party Executing Instrument

Construction against party drafting instrument.

Auditor's contract with a city provided that the auditor would audit accounts payable vendor files for duplicate payments, not that the auditor would audit for lost revenues; therefore, the auditor was not entitled to recover a 20 percent fee for $11 million in lost revenues the auditor discovered due to the county clerk's office using an incorrect millage rate for transfer taxes. Since the Recovery of Payment Form was ambiguous, the form was construed against the auditor as the drafter pursuant to O.C.G.A. § 13-2-2(5). ADI Fin. Servs. v. City of Atlanta, 310 Ga. App. 700, 714 S.E.2d 270 (2011).

Grammatical Construction

Insurance policy too vague to enforce. — Title insurance policy provision attempting to limit the insurer's liability was too vague to be enforced, although the insured had recovered over 100 percent of the amount loaned; a policy provision reducing the amount of insurance did not apply a provision defining the amount of the unpaid principal indebtedness, which included interest. O.C.G.A. § 13-2-2 could not replace contract terms other than conjunctions. Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 754 S.E.2d 85 (2013).

13-2-3. Ascertainment and enforcement of intention of parties generally.

JUDICIAL DECISIONS

Analysis

General Consideration

Meeting of minds necessary.

There was not a meeting of the minds that the purpose of the escrows was to provide a fund against which two defendants could recover on their insurance claims; no valid contract was formed and, accordingly, debtor husband's interest in the escrowed funds was the property of the bankruptcy estate. Also, as to the debtor wife, there was no meeting of the minds regarding the purpose of the escrow, and, accordingly, the wife's interest in the escrow was the property of the estate. Harris v. Nelson (In re Dunn), 436 B.R. 744 (Bankr. M.D. Ga. 2010).

Whether contract is one of suretyship or of guaranty, is governed by intention of parties.

Though some of the provisions in a tax sharing agreement entered into by a corporate parent and the corporation's subsidiary in connection with the parent's filing of consolidated federal tax returns were ambiguous, the intention of the parties as discerned by a circuit court of appeals in accord with Georgia law was that the parent was to hold, as agent for the subsidiary, any tax refund which was solely attributable to losses incurred by the subsidiary; because that was the case with this tax refund, it was the property of the subsidiary and thus was not includable in the Chapter 11 bankruptcy estate of the parent. FDIC v. Zucker (In re NetBank, Inc.), 729 F.3d 1344 (11th Cir. 2013).

Application

Condominium association had no contractual duty to remove snow and ice. — Trial court properly granted a condominium association summary judgment in a premises liability action because interpreting the condominium association documents established that the association did not have a duty to remove snow and ice from the common walkway where the resident fell. Scrocca v. Ashwood Condominium Ass'n, Inc., 756 S.E.2d 308, No. A13A2411, 2014 Ga. App. LEXIS 150 (2014).

Supply Agreement. — Applying Georgia rules of contract interpretation, a court held that a supply agreement did not permit a manufacturer to pass the medical device tax imposed as part of Patient Protection and Affordable Care Act (ACA) onto a distributor as a rise in the transfer price, as the sole means for raising the transfer price was set forth in the agreement, which was not ambiguous. Chemence Med. Prods. v. Medline Indus., 2013 U.S. Dist. LEXIS 171276 (N.D. Ga. Dec. 4, 2013).

Summary judgment vacated due to existence of genuine issues of fact on construction of contract. — Trial court erred by granting summary judgment to a bank because genuine issues of fact existed as to the bank's obligations under the loan contract such as whether the bank was not to record the security interests assigned to it except in the event of a default by the borrower, whether the bank breached a duty to cooperate with the borrower in foreclosing on the properties securing the underlying loans, and whether a duty on the bank to endeavor to timely review loan requests was meaningless. DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013).

13-2-4. Ascertainment of intention of parties where meaning placed on contract by one party known to other.

JUDICIAL DECISIONS

Statute can have no application unless contract is ambiguous.

In a breach of contract suit, contract construction statute was inapplicable to support contractors' interpretation of the parties' agreement because the contract was not ambiguous, which was required for application of the statute. Stone & Webster, Inc. v. Ga. Power Co., 2013 U.S. Dist. LEXIS 140457 (DC Sept. 30, 2013).

Construction of consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment

was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

Summary judgment vacated due to existence of genuine issues of fact on construction of contract. — Trial court erred by granting summary judgment to a bank because genuine issues of fact existed as to the bank's obligations under the loan contract such as whether the bank was not to record the security interests assigned to the bank except in the event of a default by the borrower, whether the bank breached a duty to cooperate with the borrower in foreclosing on the properties securing the underlying loans, and whether a duty on the bank to endeavor to timely review loan requests was meaningless. DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013).

CHAPTER 3

ELEMENTS AND FORMATION GENERALLY

Article 2
Capacity of Parties

ARTICLE 1
GENERAL PROVISIONS

13-3-1. Essentials of contracts generally.

JUDICIAL DECISIONS

Analysis

General Consideration

One seeking enforcement bears burden of proof as to essentials of contract.

In a breach of contract matter, the plaintiff had the burden of proof at trial because under Georgia law, the plaintiff was required to plead and prove all of the essential elements of this claim, O.C.G.A. § 13-3-1, including performance and the satisfaction of any conditions precedent.

Defendants were not raising an affirmative defense by offering evidence to negate plaintiff's contention that the plaintiff's termination was without cause as termination without cause was a prerequisite to the additional benefit of severance pay under an otherwise valid contract, and the burden of proving that the prerequisite had been met fell squarely on the plaintiff. Jackson v. JHD Dental, LLC, No. 1:10-CV-00173-JEC, 2011 U.S. Dist. LEXIS 63015 (N.D. Ga. June 14, 2011).

Elements to create a contract were met.

Trial court properly granted a wife's motion to enforce a prenuptial agreement and entered a judgment of divorce incorporating its terms because the language of the agreement demonstrated the parties reached a complete agreement regarding the disposition of property in the event their marriage ended in divorce, and the inclusion of the provision indicating the parties' belief that the agreement contained ambiguities did not render the agreement an unenforceable agreement to agree. Newman v. Newman, 291 Ga. 635, 732 S.E.2d 77 (2012).

Failure to show elements of enforceable contract. — Trial court did not err in granting a homeowners' association summary judgment on a resident's breach of contract claim because the resident failed to show the elements of an enforceable contract pursuant to O.C.G.A. § 13-3-1; any oral contract between the resident and a member of the association depended upon the statements of the member, who was not deposed and did not offer any affidavit, those statements, therefore, were hearsay proving nothing for the purposes of summary judgment. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

In this breach of contract action, the grant of summary judgment to the appellees was affirmed because none of the documents the appellant cited as establishing a contract between the appellant and the appellees did so; the sales pamphlet, although produced by one appellee, did not constitute a contract because at best, it was an invitation to bargain. Uhlig v. Darby Bank & Trust Co., 2014 U.S. App. LEXIS 3585 (11th Cir. Feb. 26, 2014) (Unpublished).

Contract existence was question of fact for a jury.

Trial court erred in granting an employer summary judgment in an employee's breach of contract action alleging that the employer owed the employee money for services rendered in connection with the sale of the employer's business because the employee presented sufficient evidence that the agreement with the employer was for a definite amount of consideration; the employee presented evidence that could allow a jury to find that the contract's subject matter was established, the parties' consideration was definite, and the parties' mutual assent to all terms was complete. Thompson v. Floyd, 310 Ga. App. 674, 713 S.E.2d 883 (2011).

Documents did not comprise written contract.

Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. Ga. Dep't of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Cited in Jones v. Forest Lake Vill. Homeowners Ass'n, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Consideration

Contract lacking essential element when parties fail to agree upon consideration.

Trial court did not err in denying a motion to enforce a settlement agreement because the parties' minds did not meet at the same time and in the same sense on the essential contractual element of consideration. Graham v. HHC St. Simons, Inc., 322 Ga. App. 693, 746 S.E.2d 157 (2013).

Consideration not Shown

Three documents alleged to form contract did not state consideration. — Engineering firm was properly granted summary judgment in a breach of contract suit because the three documents the cus-

tomer claimed to form the written contract did not contain the essential element of consideration; thus, the parties' agreement was not a contract in writing and the four-year limitation period under O.C.G.A. § 9-3-25 applied and the suit was time barred. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361 (2012).

Assent to Terms

Parties must assent to all terms in same sense.

Owner of property adjacent to a bankruptcy debtor's private airport did not have an easement to use the airport through a declarations document of homeowners since not all homeowners executed the document, the document was not in final form, and thus there was no assent to the terms of the document. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808 (Bankr. N.D. Ga. 2013).

Agreement possible although written agreement not signed. — Genuine issues of fact remained on a lender's claim that a closing attorney had violated an escrow agreement. Although no escrow agreement was signed, the parties negotiated an escrow agreement, the attorney forwarded the lender a document that complied with the lender's requests, and the lender wired the funds the following day, suggesting that there was a meeting of the minds. Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 754 S.E.2d 85 (2013).

Triable issues as to contract terms remained.

Trial court erred by granting summary judgment in favor of the closing agent on a lender's claim for breach of the escrow agreement because genuine issues of material fact remained as to whether there was a meeting of the minds with regard to an escrow agreement as a withdrawal or revision of the last version of the escrow agreement drafted was never made prior to the loan being funded the next day. Doss & Assocs. v. First Am. Title Ins. Co., 2013 Ga. App. LEXIS 968 (Nov. 21, 2013).

Agreement not shown. — When a guarantor alleged that a lender promised to provide "100% financing" for a new facility, the guarantor's breach of contract counterclaim failed because the guarantor pointed to no evidence of any consideration for the alleged $900,000 promise, a significant modification of the written contract. Nissan Motor Acceptance Corp. v. Sowega Motors, Inc., No. (CDL), 2012 U.S. Dist. LEXIS 128854 (M.D. Ga. Sept. 11, 2012).

Requisite Certainty

Requirement of certainty extends to all essentials of contract.

While plaintiff lender stated the lender was willing to negotiate some type of forbearance agreement (FA) on execution, crucial terms (duration and conditions of payments) were still missing, and since the next day the defendant borrower was informed the lender would just confirm the arbitration award and terminate negotiations, there was never a meeting of the minds on the specific terms of a FA and, thus, under O.C.G.A. §§ 13-3-1 and 13-3-2, there was no enforceable contract. GE Commer. Distrib. Fin. Corp. v. Ball, No. 11-13744, 2012 U.S. App. LEXIS 14334 (11th Cir. July 13, 2012) (Unpublished).

Genuine issues of fact existed as to terms. — Trial court erred by granting summary judgment to the defendants on the part of the owner's claim for breach of contract because a letter of agreement that the part owner refused to sign, as well as other documents, detailed the part owner's compensation following each deal; thus, genuine factual issues existed as to whether the contract's subject matter was established, the parties' consideration was definite, and the parties' mutual assent to all terms was complete. Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013).

Subject Matter

Main disputed term addressed in both versions of agreement. — Trial court did not err by enforcing a settlement agreement because two written versions of an agreement were signed by the mortgagor and both documents contained the main disputed term, namely the modification of the security deed on the Georgia home, and both documents provided that

the parties would execute all documents necessary to resolve the matter and cooperate to effectuate the settlement in a timely manner. Tillman v. Vinings Bank, 324 Ga. App. 469, 751 S.E.2d 117 (2013).

13-3-2. Contract incomplete without assent of parties to terms thereof; withdrawal of bid or proposition by party.

Law reviews. — For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898 (2013).

Mutuality of Assent

Meeting of minds of parties is necessary.

While plaintiff lender stated the lender was willing to negotiate some type of forbearance agreement (FA) on execution, crucial terms (duration and conditions of payments) were still missing, and since the next day the defendant borrower was informed the lender would just confirm the arbitration award and terminate negotiations, there was never a meeting of the minds on the specific terms of a FA and, thus, under O.C.G.A. §§ 13-3-1 and 13-3-2, there was no enforceable contract. GE Commer. Distrib. Fin. Corp. v. Ball, No. 11-13744, 2012 U.S. App. LEXIS 14334 (11th Cir. July 13, 2012) (Unpublished).

No contract arises if parties have not agreed to same thing.

Debtors' breach of contract claim against a bank failed since it was clear that the trial period plan agreement, upon which those claims were based, contained none of the essential contract terms, including an agreement as to the essential terms. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

13-3-4. Effect of conditions precedent or subsequent upon rights of parties under contracts.

JUDICIAL DECISIONS

Rescission of a contract was inappropriate because of condition precedent. — Rescission of a contract was inappropriate under O.C.G.A. § 13-4-62 because the purchasers premised the purchasers' rescission for nonperformance claim upon the failure of a contingency that acted as a condition precedent in a purchase agreement and the failure to satisfy the condition precedent, that the franchisor would agree to the purchaser's obtaining the seller's ice cream store franchise, excused the parties' obligations and performance under the purchase agreement. Yi v. Li, 313 Ga. App. 273, 721 S.E.2d 144 (2011).

13-3-5. Effect of impossible, immoral, and illegal conditions.

JUDICIAL DECISIONS

Unavailability of selected arbitral forum. — Trial court erred by finding that an arbitration agreement executed as part of a nursing home admissions process was enforceable because the unavailability of the selected arbitral forum rendered the agreement impossible to enforce since the forum selection was integral to the agreement and did not permit substitution. Miller v. GGNSC Atlanta, LLC, 323 Ga. App. 114, 746 S.E.2d 680 (2013).

ARTICLE 2

CAPACITY OF PARTIES

13-3-20. Minors — Contracts for property or valuable consideration; contracts for necessaries.

(a) Generally the contract of a minor is voidable. If in a contractual transaction a minor receives property or other valuable consideration and, after arrival at the age of 18, retains possession of such property or continues to enjoy the benefit of such other valuable consideration, the minor shall have thereby ratified or affirmed the contract and it shall be binding on him or her. Such contractual transaction shall also be binding upon any minor who becomes emancipated by operation of law or pursuant to Article 10 of Chapter 11 of Title 15.

(b) The contract of a minor for necessaries shall be binding on the minor as if the minor were 18 years of age except that the party furnishing them to the minor shall prove that the parent or guardian of such minor had failed or refused to supply sufficient necessaries for the minor, that the minor was emancipated by operation of law, or the minor was emancipated pursuant to Article 10 of Chapter 11 of Title 15. (Ga. L. 1858, p. 58, § 1; Code 1863, §§ 2691, 2693; Code 1868, §§ 2687, 2689; Code 1873, §§ 2729, 2731; Code 1882, §§ 2729, 2731; Civil Code 1895, §§ 3647, 3648; Civil Code 1910, §§ 4232, 4233; Code 1933, § 20-201; Ga. L. 1966, p. 291, § 1; Ga. L. 1969, p. 640, § 1; Ga. L. 1972, p. 193, § 2; Ga. L. 2006, p. 141, § 3/HB 847; Ga. L. 2013, p. 294, § 4-3/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted "Article 10" for "Article 6" in the last sentence of subsection (a) and near the end of subsection (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any

prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

ARTICLE 3

CONSIDERATION

13-3-40. Necessity for consideration; presumption of consideration.

JUDICIAL DECISIONS

Analysis

Application

Application

Consideration shown. — Summary judgment in favor of the lessor on the lessor's breach of the lease claim was properly granted because there was no failure of consideration as the evidence showed that the lessor did provide the professional corporation with a functionally operational imaging center as required under the lease. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

13-3-42. Acts which constitute consideration; effect of consideration given or received by persons other than promisor or promisee.

JUDICIAL DECISIONS

Analysis

Application
Promises for Benefit of Third Party

Application

Amendment of agreement between firm and clients. — Award of attorney fees was affirmed because the parties then entered into negotiations, during which the law firm made clear that the firm would discontinue work altogether (as was authorized by the terms of the original agreement) unless the clients agreed to a new compensation arrangement. Both parties agreed and entered into the amendment. Rowe v. Law Offices of Ben C. Brodhead, P.C., 319 Ga. App. 10, 735 S.E.2d 39 (2012).

Past consideration cannot support promise. — Trial court erred by denying a couple's motion for a directed verdict on a personal assistant's claim against the couple for breach of a 2010 agreement because the agreement relied upon was unenforceable and did not provide consideration for the payment of $450,000 for services already performed; therefore, the 2010 agreement was unenforceable as a matter of law and should not have been submitted for the jury's consideration. Lee v. Choi, 323 Ga. App. 370, 744 S.E.2d 871 (2013).

Promises for Benefit of Third Party

Promise to pay another's debt, supported by relinquishment of lien on collateral for such debt.

When the owner of a Chapter 11 debtor signed a personal guaranty of its debt in return for the withdrawal of an application for the appointment of a trustee, there was consideration for the guaranty

because under the circumstances the guaranty represented a well-considered bargain, the owner was a sophisticated businessperson who read the agreement and discussed the agreement with counsel before signing, and it did not matter that the withdrawal of the motion did not directly benefit the owner personally. Abdulla v. Klosinski, No. 110-159, 2012 U.S. Dist. LEXIS 137641 (S.D. Ga. Sept. 25, 2012).

13-3-44. Effect of promise which is reasonably expected to induce action or forbearance by promisee or third person; requirement as to proof of reliance in cases of charitable subscriptions or marriage settlements.

JUDICIAL DECISIONS

Analysis

General Consideration

Sale of assets. — When a facilities owner did not sign an asset sale agreement, a hospital's promissory estoppel claim failed because the parties' letter of intent coupled with the hospital's representation in a premerger notification that the parties would not execute a "binding asset sale agreement" until the Georgia Attorney General approved the agreement established as a matter of law that the hospital could not reasonably rely on the facilities owner's "promise" to purchase the hospital assets. St. Joseph Hosp., Augusta, Ga., Inc. v. Health Mgmt. Assocs., 705 F.3d 1289 (11th Cir. 2013).

Failure to show existence of promise or representation for medical services. — Corporation and the insurance company were entitled to summary judgment on the burn center's promissory estoppel claim pursuant to O.C.G.A. § 13-3-44(a); the burn center failed to identify a single promise or representation made by the corporation or the insurance company to pay for the medical services provided to the corporation's employee and could not point to a single piece of evidence showing that the corporation or the insurance company promised to pay the usual, reasonable, and customary rate under the CPT Rules. Moreover, based on the evidence presented, there was no injustice to avoid since the burn center had been paid more than what would have been required under either Mississippi's or Georgia's workers' compensation medical fee schedules. Joseph M. Still Burn Ctrs., Inc. v. AmFed Nat'l Ins. Co., No. 109-34, 2010 U.S. Dist. LEXIS 31299 (S.D. Ga. Mar. 31, 2010).

Vague and indefinite promise. — Trial court did not err in granting a payee's motion for summary judgment in its action to collect on a promissory note and to enforce a guaranty because the payee satisfied its burden of showing the lack of a genuine issue of fact as to the defense of estoppel; although the payee's alleged promises contemplated a loan for a certain duration, the promise was vague and indefinite as to other material terms, particularly the interest rate. Ga. Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 700 S.E.2d 662 (2010).

Debtors' promissory estoppel claims against a bank failed since the alleged promise to provide a loan modification was too vague. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

In a bank's suit to recover on defaulted notes and guaranties, the borrowers and guarantors failed to establish the element of an estoppel defense because the borrowers did not show that the borrowers reasonably relied on the bank's alleged rep-

resentation regarding its sale of the notes, particularly as the notes and guaranties contained integration clauses and provided only for written modification. Capital City Developers, LLC v. Bank of N. Ga., 316 Ga. App. 624, 730 S.E.2d 99 (2012).

Promissory Estoppel

1. In General

Promissory estoppel requires reasonable reliance.

District court erred in granting a company summary judgment as to an investment broker's promissory estoppel claim under O.C.G.A. § 13-3-44(a) for the recovery of a commission because a jury could find that the company had promised to pay the broker a commission according to the terms of an unsigned engagement letter and that the broker had reasonably relied on that promise. Hemispherx Biopharma, Inc. v. Mid-South Capital, Inc., 690 F.3d 1216 (11th Cir. 2012).

Failure to show reliance on a promise.

In an action alleging multiple claims involving 33 flatbed trailers, summary judgment in favor of the trailer manufacturer was appropriate on a promissory estoppel claim because the lessee could not show that the lessee relied to the lessee's detriment upon an alleged promise that certain repairs would make the trailers safe to operate on the road; the lessee failed to present any evidence regarding the safety and effectiveness of the repair protocol. Home Depot U.S.A., Inc. v. Wabash Nat'l Corp., 314 Ga. App. 360, 724 S.E.2d 53 (2012).

Borrower failed to state a promissory estoppel claim based on the alleged refusal by a lender's successor to permanently modify a mortgage loan; the borrower did not allege that the successor made any promise to permanently modify the loan. Miller v. Chase Home Fin., LLC, 677 F.3d 1113 (11th Cir. 2012).

2. Application

Accepting reduced rent waived landlord's claim to original claim to original lease amount. — Trial court did not err by rejecting a landlord's claim for the difference in unpaid rent for a certain time period because there was evidence to support the trial court's finding that even if the landlord orally agreed to a reduced rent for three months, the landlord waived the landlord's right to insist on the original lease payment terms when the lessee tendered and the landlord accepted reduced rent payments before the landlord gave notice of the landlord's intent to reinstate the rent payment terms of the original lease. Jaraysi v. Sebastian, 318 Ga. App. 469, 733 S.E.2d 785 (2012).

Consultant fees. — In an action by one consultant for unpaid fees in connection with a project to revitalize a public housing facility, material issues of fact precluded summary judgment to another consultant and the consultant's associated holding company on claims for promissory estoppel when in light of the testimony and evidence of record, including an e-mail, a trier of fact could have concluded that the second consultant promised to pay the first consultant ten percent of that consultant's net developer's fee, an amount sufficiently definite to be enforced. Jones v. White, 311 Ga. App. 822, 717 S.E.2d 322 (2011).

Insurance policies.

Although the insured argued that because of the agent's representations that the insured would provide retroactive coverage if the insured renewed the insured's policy with the insurer rather than entering into a new insurance contract with another company at a lower rate, at the very most, the insured's reliance on the agent's promise of retroactive coverage cost the insured the difference in insurance premiums; however, this theory of detrimental reliance could not provide the insured with a basis to recover damages in relation to the insurer's refusal to cover the insured's crash. Rutland v. State Farm Mut. Auto. Ins. Co., No. 10-10734, 2010 U.S. App. LEXIS 16744 (11th Cir. Aug. 12, 2010) (Unpublished).

When an insured was in a car crash after an insurer canceled the policy for failing to pay the premium and an insurance employee allegedly told the insured that the insurer would provide retroactive coverage for the crash if the insured paid

the past-due amount, the insurer had no duty to defend the insured because, inter alia, promissory estoppel did not apply since the representations made by the employee occurred after the car accident and after the policy had been canceled for non-payment. Rutland v. State Farm Mut. Auto. Ins. Co., No. 10-10734, 2011 U.S. App. LEXIS 9859 (11th Cir. May 12, 2011) (Unpublished).

Summary judgment improper. — Complaint alleging that an agreement had been reached between plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized, set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's neighbor, the plaintiff's authorized agent acting on the plaintiff's behalf, to protect the well-being of the plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

Homeowners' association's failure to enforce stormwater covenant. — Genuine issues of material fact remained as to whether a homeowners' association (HOA) was estopped under O.C.G.A. § 13-3-44(a) from enforcing a stormwater facilities maintenance covenant against owners whose home had flooded because the HOA had repeatedly taken the position that the county, not the owners, was responsible for the repairs. Polo Golf & Country Club Homeowners' Ass'n v. Rymer, 294 Ga. 489, 754 S.E.2d 42 (2014).

Hospital's promise to protect a patient's dogs. — Trial court erred by granting the motion for summary judgment of a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the patient's authorized agent acting on the patient's behalf to protect the well-being of the patient's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

No promise to consummate sale. — Defendant may have promised that the defendant was interested in acquiring the hospital, that the defendant planned to pursue negotiations, and that the defendant had every intention of finalizing and executing the Asset Sales Agreement, but the plaintiffs could not point to a single instance in which the defendant promised to consummate the sale; moreover, even if the evidence showed that a promise sufficient to support a promissory estoppel claim had been made, the express language that appears in the letter of intent was fatal to the plaintiffs' claim of reasonable reliance. St. Joseph Hosp. v. Health Mgmt. Assocs., No. 107-104, 2011 U.S. Dist. LEXIS 33715 (S.D. Ga. Mar. 30, 2011).

Homeowners' association member's promise to resident. — Trial court did not err in granting a homeowners' association summary judgment on a resident's promissory estoppel claim because the resident failed to come forward with any evidence creating an issue of fact on the resident's claim; the resident stated that a member of the association promised the resident that the association would store the resident's airboat but that claim rested on statements allegedly made to the resident by the member, which were hearsay. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

No pre-lease promise. — There existed no pre-lease promise to finish construction of an office building because the lease agreement contained a merger clause and an amendment was signed by the lessee with full knowledge that the landlord's promise of completion by a certain date had not occurred; thus, the lessee could not establish that the lessee was induced to sign the lease in reliance on the promise. Jaraysi v. Sebastian, 318 Ga. App. 469, 733 S.E.2d 785 (2012).

Bank entitled to collect upon indebtedness of defaulted loan. — Bank

was entitled to collect upon the indebtedness of a defaulted loan because the evidence did not support the defense of promissory estoppel as the alleged promise supporting the promissory estoppel claim was vague and indefinite. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

Promises arose from underlying contracts. — Because "promises" which the borrower sought to enforce arose from underlying contracts (note, security deed and settlement agreement), promissory estoppel did not apply. Phillips v. Ocwen Loan Servicing, LLC, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

Promissory note. — Trial court did not err by finding a lack of a genuine issue of fact as to whether makers and guarantors reasonably relied on any promises made by a trust company to extend the original loan because nothing in their testimony established evidence of anything beyond negotiations to extend a promissory note; assumptions that the company would extend the original loan at the same terms without any definite statement by the company about the terms of the proposed loan did not create an issue of fact for the jury. 685 Penn, LLC v. Stabilis Fund I, L.P., 316 Ga. App. 210, 728 S.E.2d 840 (2012).

13-3-45. Effect of partially valid consideration; effect of illegal consideration.

JUDICIAL DECISIONS

Cited in Dewrell Sacks, LLP v. Chi. Title Ins. Co., 324 Ga. App. 219, 749 S.E.2d 802 (2013).

CHAPTER 4

MODIFICATION, EXTINGUISHMENT, AND RENEWAL

ARTICLE 1

GENERAL PROVISIONS

13-4-1. Alteration of written contract — Effect generally.

JUDICIAL DECISIONS

Guaranty not void. — Meaning of a guaranty was not changed by a handwritten entry and, therefore, the agreement was not void because the guaranty was already limited by a specified term; the guarantor did not show that the change materially altered the agreement. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147 (2012).

13-4-4. Effect of mutual departure from contract terms.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

To effectuate new agreement, departure from original terms must be mutual.

Court found no error in the district court's finding that the company's mutual departure defense failed as a matter of law. Although the company may have unilaterally interpreted the bank's previous renewals and/or modifications of the notes to have been waivers of the specified dates of maturity, there was no evidence that the bank ever intended them to be so. Branch Banking & Trust Co. v. Lichty Bros. Constr., Inc., No. 12-11639, 2012 U.S. App. LEXIS 18418 (11th Cir. Aug. 30, 2012) (Unpublished).

Cited in Vratsinas Constr. Co. v. Triad Drywall, LLC, 321 Ga. App. 451, 739 S.E.2d 493 (2013).

Application

Borrower failed to show "mutual and intended" departure. — Borrower failed to state a claim for mutual departure because the borrower failed to allege facts sufficient to support that the borrower and the loan servicer made a "mutual and intended" departure from the terms of the borrower's loan. Phillips v. Ocwen Loan Servicing, LLC, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

Accepting benefits and continuing performance after deviation prevents subsequent suit for benefits under original agreement.

Parent of three children was liable for the children's tuition for the 2011-2012 school year after the children did not attend the school, based on tuition contracts the parent signed; the parent failed to show that the school's historically flexible execution of contracts demonstrated a departure from enforcing the notice requirement for the withdrawal of the parent's students from the school under O.C.G.A. § 13-4-4, and the amount owed was not an unenforceable penalty. Pierre v. St. Benedict's Episcopal Day School, 324 Ga. App. 283, 750 S.E.2d 370 (2013).

No mutual departure from terms of lease. — Trial court was authorized to find that the landlord and the tenant never mutually departed from the terms of the lease to relieve the tenant from paying common area maintenance (CAM) charges or to permanently forgive a portion of the monthly rent that was owed; the landlord agreed to allow the tenant to temporarily pay a reduced amount of monthly rent but with the understanding that there would be no permanent rent forgiveness and that the tenant would remain liable for the accrued shortfall in base rent and CAM charges, and the landlord sent the tenant a letter consistent with that understanding. Westmoreland v. JW, LLC, 313 Ga. App. 486, 722 S.E.2d 102 (2012).

Mutual departure from the terms of an agreement results in a quasi-new agreement suspending the original terms of the agreement until one party has given the other reasonable notice of the parties' intent to rely on the original terms, and the question whether the parties' mutual conduct caused a waiver and effected a quasi-new agreement ordinarily is a question for the jury. Circle K Stores, Inc. v. T. O. H. Assocs., 318 Ga. App. 753, 734 S.E.2d 752 (2012).

No consideration provided for departure from agreement's terms. — Partner's affirmative defense of mutual departure failed as a matter of law because there was no evidence that there was any receipt or payment of money or other consideration provided to the other partner for a departure from the terms of the partnership agreement. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

13-4-5. Effect of execution of second contract upon same matter; novation.

JUDICIAL DECISIONS

Second agreement controlled over prior agreement. — Agreement entered into in October 2005 for security services controlled a dispute between a security firm and the firm's customers, not an earlier agreement between the security firm and the customers' predecessor in interest, pursuant to O.C.G.A. § 13-4-5. USF Corp. v. Securitas Sec. Servs. USA, 305 Ga. App. 404, 699 S.E.2d 554 (2010).

ARTICLE 2

PERFORMANCE

13-4-20. Requirements as to performance of contractual obligations generally.

JUDICIAL DECISIONS

Analysis

Substantial Compliance

Substantial Compliance

Compliance with spirit as well as letter of agreement.

Electric membership corporation (EMC) board's proxy voting bylaw amendment violated the terms of a settlement agreement reached between the EMC and the EMC's members because the amendment significantly changed the conditions under which the parties' agreed-upon plan for proposing proxy voting to the members was implemented. It therefore violated the spirit if not the letter of the agreement in contravention of O.C.G.A. § 13-4-20. Brown v. Pounds, 289 Ga. 338, 711 S.E.2d 646 (2011).

13-4-21. Effect of act of God.

JUDICIAL DECISIONS

Impossibility not due to act of God nor other party.

Defendants in a contract dispute could not defend their failure to continue to honor merchant referral requirements in the parties' contract on impossibility grounds because defendants failed to identify evidence showing that performance of their obligations was "impossible" as defined by O.C.G.A. § 13-4-21 or the doctrine of impossibility. In fact, defendants did continue with referrals for approximately a year after the merger at issue. Elavon, Inc. v. Wachovia Bank, NA, No. 1:09-CV-139-ODE, 2011 U.S. Dist. LEXIS 152004 (N.D. Ga. May 23, 2011).

13-4-23. Effect of nonperformance caused by conduct of other party.

JUDICIAL DECISIONS

Subjective interpretation of events and communications prohibited recovery. — Defendant was not entitled to summary judgment on the plaintiff's breach of contract claims based upon O.C.G.A. § 13-4-23 because the defendant failed to establish as a matter of law that the plaintiff's performance or non-performance under any agreement between the parties was sufficient to excuse the defendant of the defendant's obligations under the agreements because the court could not have determined that one party's conduct, which was based in large part upon subjective interpretations of certain events and communications, was unreasonable as a matter of law. Whitesell Corp. v. Electrolux Home Prods., No. 103-050, 2011 U.S. Dist. LEXIS 61442 (S.D. Ga. June 8, 2011).

Failure to exercise option to purchase property. — Trial court erred in granting a flea market operator and a property owner summary judgment in their slander of title action against a real estate investment firm and the estate of the firm's sole member because there was a genuine issue of material fact as to whether the firm was a party to the sales contract entered into between the operator and the member; if the firm and member could establish that they failed to schedule a closing on the subject property because the operator refused to sell (or to allow the owner to sell) the property, then the operator and owner could not rely upon or benefit from such a failure as a means of establishing that the firm and member failed to exercise the option to purchase the property. Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011).

Buyer's right to specific performance. — Trial court erred in granting sellers' motion for summary judgment in a buyer's action seeking specific performance of land purchase agreements because whether the buyer waived the buyer's right to specific performance remained an issue for the trier of fact; although the agreements originally made the buyer's failure to purchase a sewer plant parcel a terminating event, the parties agreed in writing at the first closing that the buyer had performed adequately nonetheless, and under the circumstances, the sellers had no basis for asserting that the buyer's failure either to buy the sewer plant or to specify the parcels in the fifth option purchase stripped the buyer, as a matter of law, of the buyer's right to specific performance. Simprop Acquisition Co. v. L. Simpson Charitable Remainder Unitrust, 305 Ga. App. 564, 699 S.E.2d 860 (2010).

13-4-24. Requirements for and effect of tender generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Mere written proposal to pay money, with no offer of cash, not tender.

While the mortgagors sent a notice to the loan servicer offering to tender a payment of the full amount due, no actual money was tendered in the letter, thus, there was no valid tender, so cancellation of the deed was not available under O.C.G.A. § 13-4-24. Edward v. BAC Home Loans Servicing, L.P., No. 12-15487, 2013 U.S. App. LEXIS 17054 (11th Cir. Aug. 16, 2013) (Unpublished).

ARTICLE 3

PAYMENT

13-4-42. Appropriation of payments.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Presumption as to payment priority. — Because the debtor was not restricted by the terms of the note in electing which account should be credited with payments first, and because of the presumption as to payment priority found in O.C.G.A. § 13-4-42, the creditor's objection was overruled and the debtor's modified Chapter 13 plan was confirmed. In re Deloach, No. 99-21047, 2000 Bankr. LEXIS 2189 (Bankr. S.D. Ga. Aug. 18, 2000).

ARTICLE 4

RESCISSION

13-4-60. Rescission for fraud.

JUDICIAL DECISIONS

Analysis

Rescission
Restoration of Benefits
1. In General

Rescission

Rescission and timing of lawsuit. Genuine fact dispute existed as to whether the plaintiff timely sought rescission under O.C.G.A. § 13-4-60 when the plaintiff sought rescission contemporaneously with the filing of the plaintiff's lawsuit because the plaintiff's management decisions and continued operation of a manufacturer after a defendant arguably walked away from the joint venture were not inconsistent with rescission. Denim N. Am. Holdings, LLC v. Swift Textiles, LLC, 816 F. Supp. 2d 1308 (M.D. Ga. 2011).

Restoration of Benefits

1. In General

Restitution before absolution is general rule. Even if there were grounds for recession of a note between a chapter debtor and trustee, recession for fraud required return of the money received under O.C.G.A. § 13-4-60, which the debtor failed to do. The fact that the debtor was financially unable to do so did not excuse this requirement. Ivey Mgmt. Corp. v. Ivey (In re Ivey Mgmt. Corp.), No. 11-5029, 2011 Bankr. LEXIS 5175 (Bankr. M.D. Ga. Dec. 22, 2011).

Insurer seeking to rescind policy required to return premiums paid under contract, even if insured originally obtained policy by fraud. — Georgia law generally required an insurer seeking to rescind a policy to return any premiums paid under the contract, even if the insured originally obtained the policy by fraud; thus, while a default against defendant insured entered on plaintiff life insurer's fraud and rescission claims, the

insurer could not retain the premiums paid defendant beneficiary trust. PHL Variable Ins. Co. v. Faye Keith Jolly Irrevocable Life Ins. Trust, No. 11-12188, 2012 U.S. App. LEXIS 5283 (11th Cir. Mar. 14, 2012) (Unpublished).

13-4-62. Rescission for nonperformance.

JUDICIAL DECISIONS

O.C.G.A. § 13-4-62 contains no express statutory requirement for restoration as a condition precedent to rescission for nonperformance. Radio Perry, Inc. v. Cox Commc'ns, Inc., 323 Ga. App. 604, 746 S.E.2d 670 (2013).

When equitable action for rescission appropriate.

Rescission of a contract was inappropriate under O.C.G.A. § 13-4-62 because the purchasers premised the purchasers' rescission for nonperformance claim upon the failure of a contingency that acted as a condition precedent in a purchase agreement and the failure to satisfy the condition precedent, that the franchisor would agree to the purchaser's obtaining the seller's ice cream store franchise, excused the parties' obligations and performance under the purchase agreement. Yi v. Li, 313 Ga. App. 273, 721 S.E.2d 144 (2011).

Rescission of settlement agreement. — Trial court did not err in denying a temporary staffing agency's motion to enforce and enter judgment on a settlement agreement because, shortly after the agency entered into the settlement agreement with a widow and a decedent's estate, it announced that it would not make the payments it had agreed to make; because the entire purpose of the contract was the exchange of certain sums for a release from liability, the trial court did not err in ruling that the widow and estate had, with authority, rescinded the post-trial settlement agreement. Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 722 S.E.2d 370 (2012), cert. denied, No. S12C0940, 2012 Ga. LEXIS 533 (Ga. 2012).

Failure to offer restoration does not defeat rescission claim as a matter of law. — In a contract dispute, the trial court erred by granting the defendant's motion to dismiss because evidence could be introduced within the framework of the complaint to show that the plaintiff unilaterally rescinded the contract after the defendant took actions that constituted a material breach and the plaintiff's failure to offer restoration under O.C.G.A. § 13-4-62 did not defeat the plaintiff's rescission claim. Radio Perry, Inc. v. Cox Commc'ns, Inc., 323 Ga. App. 604, 746 S.E.2d 670 (2013).

ARTICLE 5

RELEASE

13-4-80. Release of another bound jointly or primarily or acceptance of higher security for same debt.

JUDICIAL DECISIONS

Right to recoup taxes forfeited. — Superior court did not err in reversing the decision of the Georgia Department of Revenue that a corporate officer was liable for a restaurant's sales and use taxes pursuant to O.C.G.A. § 48-2-52 because the release of and refund payment to the majority owner of the restaurant operated as a release of the officer; under O.C.G.A. § 13-1-13, by voluntarily paying the owner a settlement amount with full awareness of any potential joint claim the Department had against the officer, the Department forfeited any right the Department had to recoup from the officer the payment the Department made to the

owner. Ga. Dep't of Revenue v. Moore, 317 Ga. App. 31, 730 S.E.2d 671 (2012).

ARTICLE 6

ACCORD AND SATISFACTION

13-4-103. Acceptance of less than amount of debt.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Check did not meet criteria for establishing accord and satisfaction not met. — Trial court did not err in granting a creditor summary judgment in the creditor's action to collect the amount the creditor loaned to a debtor because a check a third party sent to the creditor did not meet the criteria of O.C.G.A. § 13-4-103(b) for accord and satisfaction when the cover letter that accompanied the check, which stated that the check was payment in full of the debt, was not an agreement between the creditor and debtor but was, at most, an agreement between the creditor and the third party; the cover letter did not meet the statutory language requiring an agreement between "the creditor and debtor," and sending such a cover letter with a check marked "payment in full," which check was then cashed, was not an "independent" agreement and was not an agreement between the creditor and debtor. Formaro v. Suntrust Bank, 306 Ga. App. 398, 702 S.E.2d 443 (2010).

CHAPTER 5

DEFENSES

ARTICLE 1

GENERAL PROVISIONS

13-5-4. Mistake of fact or law.

JUDICIAL DECISIONS

Trial court erred in setting aside consent decree. — Trial court erred in finding that a consent judgment was void due to impossibility of performance or lack of mutuality and in denying the sellers' motion for judgment instanter on the consent judgment because the purchasers accepted the risk that the purchasers would be unable to complete the road on time per the agreement and set up an alternative method of compliance, namely, the payment of money to the sellers. Kothari v. Tessfaye, 318 Ga. App. 289, 733 S.E.2d 815 (2012).

13-5-6. Duress.

JUDICIAL DECISIONS

Analysis

What Constitutes Duress

What Constitutes Duress

Sophisticated businessperson who makes guaranty with advice of counsel does not do so under duress. — When the owner of a Chapter 11 debtor signed a personal guaranty of its debt, which included a waiver of defenses clause, in return for the withdrawal of a motion by a creditor for the appointment of a trustee, counsel for creditor may have been shrewd in filing the motion and negotiating the terms of the guaranty but there was no foul in cunning, and because the signer of the guaranty agreement was sophisticated in business matters and obtained advice of counsel before signing, the defense of duress was not available to void the contract. Abdulla v. Klosinski, No. 110-159, 2012 U.S. Dist. LEXIS 137641 (S.D. Ga. Sept. 25, 2012).

Stress the debtor felt fell outside the scope of legal "duress" because there was no evidence of wrongful or unlawful conduct, imprisonment, threats, or any other acts of that nature, and the creditor driving a hard bargain and insisting that the debtor, which owed $6,000,000, accept certain terms, conditions, and boilerplate material of its standard commercial loan documents could have hardly been classified as wrongful or illegal conduct. In re Chatham Parkway Self Storage, LLC, 2014 Bankr. LEXIS 837 (Bankr. S.D. Ga. Mar. 3, 2014).

13-5-8. Noncompliance with condition, failure of consideration, or other act as defense.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Trial court erred in setting aside consent decree. — Trial court erred in finding that a consent judgment was void due to impossibility of performance or lack of mutuality and in denying the sellers' motion for judgment instanter on the consent judgment because the purchasers accepted the risk that the purchasers would be unable to complete the road on time per the agreement and set up an alternative method of compliance, namely, the payment of money to the sellers. Kothari v. Tessfaye, 318 Ga. App. 289, 733 S.E.2d 815 (2012).

13-5-9. Total or partial failure of consideration generally.

JUDICIAL DECISIONS

No failure of consideration. — Summary judgment in favor of the lessor on the lessor's breach of the lease claim was properly granted because there was no failure of consideration as the evidence showed that the lessor did provide the professional corporation with a functionally operational imaging center as re-

quired under the lease. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

13-5-10. Failure to perform dependent covenant.

JUDICIAL DECISIONS

Trial court erred in setting aside consent decree. — Trial court erred in finding that a consent judgment was void due to impossibility of performance or lack of mutuality and in denying the sellers' motion for judgment instanter on the consent judgment because the purchasers accepted the risk that the purchasers would be unable to complete the road on time per the agreement and set up an alternative method of compliance, namely, the payment of money to the sellers. Kothari v. Tessfaye, 318 Ga. App. 289, 733 S.E.2d 815 (2012).

ARTICLE 2

STATUTE OF FRAUDS

13-5-30. Agreements required to be in writing.

JUDICIAL DECISIONS

Analysis

General Consideration

Parol evidence properly excluded. — Because the lease was required by the statute of frauds to be in writing, the lease could not be modified by an oral agreement, and the trial court did not err in excluding parol evidence of the alleged oral agreements between the parties. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

Writing Requirement Generally

Parol evidence admissible to clarify and explain ambiguities of written instrument.

Trial court erred in granting a bank's motion for summary judgment in the bank's action for breach of a guaranty because parol testimony was admissible and created a genuine issue of material fact over whether the guaranty was executed after the bank had already extended credit to the underlying debtor, and thus over whether the guaranty was void for lack of consideration; as in the context of a deed, a witness is entitled to offer parol testimony that the guaranty was executed on a date other than the date inserted on the guaranty. Helton v. Jasper Banking Co., 311 Ga. App. 363, 715 S.E.2d 765 (2011).

Email negotiating settlement did not violate statute of frauds. — Settlement agreement did not violate the statute of frauds, O.C.G.A. § 13-5-30(4), because the email exchange between the parties was sufficient to memorialize the terms of the settlement agreement and render the agreement an enforceable contract. Johnson v. DeKalb County, 314 Ga. App. 790, 726 S.E.2d 102 (2012).

Promises to Answer for Debts of Another

1. In General

Parol evidence.

Guaranties from 2008 were not effective under O.C.G.A. § 13-5-30(2) because the guaranties did not identify a principal debtor by name, and parol evidence was not admissible to supply the name of the principal debtor. The part performance exception to the Statute of Frauds could not have been applied again by an appellate court. Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 316 Ga. App. 496, 729 S.E.2d 612 (2012).

If guaranty omitted name of principal debtor, the guaranty was unenforceable, etc.

In a supplier's action against a construction company and the company's principal to recover payment for building materials, the trial court did not err in granting the principal's motion for summary judgment because the guaranty the principal executed as part of a credit application was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30, for failure to identify the principal debtor, and the fact that two separate agreements involving different promisors, the application for credit and the guaranty, were included in the same two-page document did not lead inexorably to the conclusion that the documents had to be construed together, but rather, the application and guaranty had to be treated as two separate writings; the guaranty did not refer to the application with sufficient clarity to justify relying upon the application to satisfy the statute of frauds and did not incorporate the terms of the application by reference, and while the guaranty stated that it was a "continuing guaranty" that covered all indebtedness due or which could become due, the application referred to an extension of credit for materials related to one specified subdivision. LaFarge Bldg. Materials, Inc. v. Pratt, 307 Ga. App. 767, 706 S.E.2d 131 (2011).

3. Application

Guaranty contract.

Statute of frauds did not bar a landlord's claim on a guaranty because the guaranty identified the debt, and the assignment contemplated in the guaranty was documented by a written agreement; when read together the documents identified the principal debt as required by the statute of frauds and, in addition, the guaranty sufficiently identified the principal debtor and provided that the guarantor consented to any subsequent assignment. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147 (2012).

Corporate officers not individually liable for corporate debt. — Plain language of the document, although poorly drafted, established that the document was a promissory note made between two lenders and a corporation, and the officers signed the document in their representative capacity on behalf of the corporation. A provision that the officers personally guaranteed the debt could not be implied pursuant to O.C.G.A. § 10-7-3. Elwell v. Keefe, 312 Ga. App. 393, 718 S.E.2d 587 (2011).

Contracts Transferring Interests in Land

1. In General

Authority to execute option contract. — Because the statute of frauds requires that an option contract for the purchase of land be in writing, the authority of an agent to execute such a contract likewise must be in writing. Garrett v. S. Health Corp. of Ellijay, Inc., 320 Ga. App. 176, 739 S.E.2d 661 (2013).

3. Writing

Debtor's principal believed that the principal had a commitment in written form on the record, but, while the documents evidenced an active effort to place permanent loans for purchasers of

condominium units, there was nothing which remotely met the standard for proving a loan commitment. Darby Bank & Trust Co. v. Captain's Watch, LLC (In re Captain's Watch, LLC), 447 B.R. 903 (Bankr. S.D. Ga. 2010).

4. Application

Oral agreement to purchase a homeowner's association lien. — Oral agreement to buy a homeowner's association's lien and indebtedness against real property was required to be in writing and signed by the party to be charged pursuant to O.C.G.A. § 13-5-30(4); because the buyer did not acquire an interest in the property until after the date of redemption, contrary to O.C.G.A. §§ 48-4-40 and 48-4-41, the redemption was void. DRST Holdings, Ltd. v. Brown, 290 Ga. 317, 720 S.E.2d 626 (2012).

Agreements Not to Be Performed Within One Year

Oral severance agreement barred by statute of frauds. — Trial court did not clearly err in holding that enforcement of an oral severance agreement was barred by the statute of frauds, O.C.G.A. § 13-5-30(5), because a hospital's counsel clearly and unambiguously asked a doctor if the draft employment agreement, which provided that the severance would be payable for 15 months from the effective date of termination, contained a written description of the severance terms that the doctor had agreed upon, and the doctor answered in the affirmative; the trial court determined that the doctor's deposition responses constituted a clear and unambiguous admission of the 15-month payment term, and the court's ruling as to the reasonableness of the doctor's explanation was not clearly erroneous. Bithoney v. Fulton-Dekalb Hosp. Auth., 313 Ga. App. 335, 721 S.E.2d 577 (2011).

Affidavit related to employment contract not to be fully performed within one year. — Chief executive officer was not entitled to partial summary judgment on a claim that an employer did not fund the chief executive officer's deferred compensation plan because: (1) the only evidence of the amount the employer was to contribute was the chief executive officer's self-serving affidavit; and (2) the statute of frauds barred consideration of the affidavit since the chief executive officer's employment contract was not to be performed within one year. Jones v. Hous. Auth. of Fulton County, 315 Ga. App. 15, 726 S.E.2d 484 (2012).

Effect of Full or Part Performance

Guaranty enforceable without execution date. — Express language of a personal guaranty for present and future debts owed by the borrower meant that the guarantor's obligations had no temporal limitation. Therefore, an execution date was not required to identify the debt covered, and the guaranty satisfied the statute of frauds, O.C.G.A. § 13-5-30(2), although the guaranty had no date. Brzowski v. Quantum Nat'l Bank, 311 Ga. App. 769, 717 S.E.2d 290 (2011).

Performance by one in accordance with contract, accepted by other party, removes contract from statute. District court erred in granting a company judgment on the pleadings as to an investment broker's breach-of-contract claim because the broker adequately pled that the company assented, by the company's conduct, to an engagement letter's terms, and the statute of frauds under O.C.G.A. § 13-5-30(5) did not foreclose enforcing the unsigned letter since the allegations, accepted as true, were sufficient to invoke the performance and acceptance exception to the statute of frauds under O.C.G.A. § 13-5-31(2). Hemispherx Biopharma, Inc. v. Mid-South Capital, Inc., 690 F.3d 1216 (11th Cir. 2012).

Part performance established. Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 for failing to transmit to a law firm payments the defendant received for indigent defense work because the statute of frauds, O.C.G.A. § 13-5-30(5), was not implicated; the firm performed the firm's part of the parties' agreement in paying the defendant a salary, providing rent-free office space, and offering administrative support, among other things. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Accepting reduced rent waived landlord's claim to original lease

amount. — Trial court did not err by rejecting a landlord's claim for the difference in unpaid rent for a certain time period because there was evidence to support the trial court's finding that even if the landlord orally agreed to a reduced rent for three months, the landlord waived the landlord's right to insist on the original lease payment terms when the lessee tendered and the landlord accepted reduced rent payments before the landlord gave notice of the landlord's intent to reinstate the rent payment terms of the original lease. Jaraysi v. Sebastian, 318 Ga. App. 469, 733 S.E.2d 785 (2012).

13-5-31. Agreements enforceable without writing.

JUDICIAL DECISIONS

Analysis

Full Performance Accepted on One Side

Full performance on one side removes agreement from statute of frauds.

District court erred in granting a company judgment on the pleadings as to an investment broker's breach-of-contract claim because the broker adequately pled that the company assented, by the company's conduct, to an engagement letter's terms, and the statute of frauds under O.C.G.A. § 13-5-30(5) did not foreclose enforcing the unsigned letter since the allegations, accepted as true, were sufficient to invoke the performance and acceptance exception to the statute of frauds under O.C.G.A. § 13-5-31(2). Hemispherx Biopharma, Inc. v. Mid-South Capital, Inc., 690 F.3d 1216 (11th Cir. 2012).

Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 for failing to transmit to a law firm payments the defendant received for indigent defense work because the statute of frauds, O.C.G.A. § 13-5-30(5), was not implicated; the firm performed the firm's part of the parties' agreement in paying the defendant a salary, providing rent-free office space, and offering administrative support, among other things. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Part Performance

1. In General

Part performance not applicable. — In a case in which a bank ceased efforts to foreclose on real estate securing borrowers' and guarantors' notes evidencing obligations to the bank, and sued the borrowers and guarantors on the notes, it was error to apply the "part performance" exception to the statute of frauds, O.C.G.A. § 13-5-31(3), in holding that the guarantors were estopped from asserting a statute of frauds defense against the bank because the bank's extension of credit was not partial performance proving the identity of the notes or the debtors thereon. Tampa Inv. Group, Inc. v. Branch Banking & Trust Co., 290 Ga. 724, 723 S.E.2d 674 (2012).

CHAPTER 6

DAMAGES AND COSTS GENERALLY

13-6-1. Purpose of damages.

JUDICIAL DECISIONS

Failure to show damages resulted from breach of car rental agreement. — Trial court erred in denying a customer's motion for summary judgment in a car rental company's breach of contract action because the company failed to adduce any evidence that the damages a rental truck sustained resulted from the customer's alleged breach of the rental agreement; the company admitted that customers were not responsible for damage to rented vehicles that occurred after the vehicles were returned to the company's possession and that it would have been consistent with the company's policies and procedures for a customer to return a rented vehicle to the company's premises and leave the keys in the key drop box, and the company offered no evidence to contradict the customer's evidence that the customer's friend returned the truck undamaged to the rental lot, locked the truck's windows and doors, and placed the keys in the drop box. Norton v. Budget Rent a Car Sys., 307 Ga. App. 501, 705 S.E.2d 305 (2010).

Cited in Austin v. Bank of Am., N.A., 293 Ga. 42, 743 S.E.2d 399 (2013).

13-6-2. Measure of damages — Generally.

JUDICIAL DECISIONS

Analysis

General Consideration
Measure of Damages Recoverable

General Consideration

Damages for breach of title insurance policy. — General method for computing damages for breach of a title insurance policy is the difference between the value of the property when purchased with the encumbrance or encroachment thereon, and the value of the property as it would have been if there had been no such encumbrance or encroachment. Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 754 S.E.2d 85 (2013).

No damage award when unable to show damages resulted from breach. — Trial court erred in denying a customer's motion for summary judgment in a car rental company's breach of contract action because the company failed to adduce any evidence that the damages a rental truck sustained resulted from the customer's alleged breach of the rental agreement; the company admitted that customers were not responsible for damage to rented vehicles that occurred after the vehicles were returned to the company's possession and that it would have been consistent with the company's policies and procedures for a customer to return a rented vehicle to the company's premises and leave the keys in the key drop box, and the company offered no evidence to contradict the customer's evidence that the customer's friend returned the truck undamaged to the rental lot, locked the truck's windows and doors, and placed the keys in the drop box. Norton v. Budget Rent a Car Sys., 307 Ga. App. 501, 705 S.E.2d 305 (2010).

Cited in Doss & Assocs. v. First Am. Title Ins. Co., 2013 Ga. App. LEXIS 968 (Nov. 21, 2013).

Measure of Damages Recoverable

Insured obligated to pay balance of financed amount upon cancellation of insurance policy. — Trial court properly granted an insurance premium finance corporation summary judgment on its claim against the insured for unpaid premiums because O.C.G.A. § 33-22-14(a) was not the corporation's exclusive remedy based on the finance agreement obligating the insured to pay the balance remaining once the policy was canceled. Burke v. Prime Rate Premium Fin. Corp., 325 Ga. App. 760, 754 S.E.2d 802 (2014).

13-6-4. Determination of damages generally.

JUDICIAL DECISIONS

Award held proper.

Amount of a jury's verdict of $48,612 in favor of a builder in the builder's breach of contract action against homeowners was not against the weight of the evidence because the jury's actual damage award was well within the range of payment to which the builder was contractually entitled and was otherwise authorized by the legal evidence submitted at trial. Harris v. Tutt, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

13-6-5. Duty of injured party to lessen damages resulting from breach.

JUDICIAL DECISIONS

Mitigation defense should not have barred directed verdict. — Trial court erred by failing to grant a directed verdict in favor of a bank against the defendant borrowers and guarantors because the defense of failure to mitigate damages was not a bar to a directed verdict in favor of the bank since the guarantees were absolute and unconditional; thus, liability was unaffected by any action by the bank that could have made the promissory note unenforceable. Ameris Bank v. Alliance Inv. & Mgmt. Co., LLC, 321 Ga. App. 228, 739 S.E.2d 481 (2013).

Lease contracts.

Landlord for a commercial lease for space in a shopping center was not required to mitigate the landlord's damages by attempting to re-let the premises because the landlord did not accept the tenant's attempted surrender of the premises when the tenant turned in the keys, but rather, the record showed that the tenant abandoned the premises. Sirdah v. N. Springs Assocs., LLLP, 304 Ga. App. 348, 696 S.E.2d 391 (2010).

No duty. — Because the notes and guarantees at issue appeared to be absolute promises to pay, the court found no abuse of discretion in the district court's striking of the company's failure to mitigate defense. Branch Banking & Trust Co. v. Lichty Bros. Constr., Inc., No. 12-11639, 2012 U.S. App. LEXIS 18418 (11th Cir. Aug. 30, 2012) (Unpublished).

Cited in Shropshire v. Alostar Bank of Commerce, 314 Ga. App. 310, 724 S.E.2d 33 (2012).

13-6-6. Damages and expenses recoverable — Nominal damages.

JUDICIAL DECISIONS

Lack of damages suffered by employer. — Although a terminated employee claimed that the employer had not been damaged by any of the employee's actions or inaction, it was clear that a lack of damages would not be a bar to a breach

of contract claim by the employer. Crippen v. Outback Steakhouse Int'l, L.P., 321 Ga. App. 167, 741 S.E.2d 280 (2013).

Damages as precluding summary judgment.

Trial court erred in granting a rental company and an independent third party administrator summary judgment in a car owner's action alleging that they breached a settlement agreement on the ground that the owner incurred no damages from the administrator's inclusion of Medicare as a payee on the settlement check because genuine issues of fact remained with regard to damages suffered by the owner; the owner had the right to seek specific performance of an express agreement regarding the payees to be listed on the settlement check, and there was a general right to seek nominal damages in breach of contract actions. Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661 (2012).

Trial court erred by granting summary judgment to a subdivision association on the lot owners' breach of contract claim because nothing in the subdivision master declarations permitted the association to make consolidation of the lots conditional upon the owners' execution of an affidavit acknowledging that the lots would be permanently assessed separately; thus, the owners were entitled to recover nominal damages. Henderson v. Sugarloaf Residential Prop. Owners Ass'n, 320 Ga. App. 544, 740 S.E.2d 273 (2013).

Award of nominal damages for $120,000 found not trivial and reversed. — Trial court erred in a breach of contract suit when the court denied the defendant's motion for a new trial as to the amount of nominal damages awarded because an award of nominal damages in the amount of $120,000 in a case in which actual damages amounted to five times that amount is neither absolutely nor relatively trivial. Fowler's Holdings, LLLP v. CLP Family Invs., L.P., 318 Ga. App. 73, 732 S.E.2d 777 (2012).

Recovery limited to nominal damages by corporation. — If a corporation was able to prove a breach of a consent judgment by the corporation's previous owner, the corporation could not show actual damages and was limited to recovering nominal damages because the corporation's claim was foreclosed by a previous decision of the court of appeals; that case was binding precedent and established that regardless of the owner's proof of claim, a sale of a motel would not have occurred, precluding the corporation's recovery of actual damages on the corporation's breach of contract claim. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

13-6-7. Damages and expenses recoverable — Liquidated damages generally.

JUDICIAL DECISIONS

When contract provides for liquidated damages, nonbreaching party cannot elect to take actual damages.

After an employee was properly awarded recovery under a liquidated damages provision in an employment contract, the employee was not entitled to recover actual damages. McBride v. Mkt. St. Mortg., No. 07-8044, 2010 U.S. App. LEXIS 11191 (10th Cir. June 2, 2010) (Unpublished).

Liquidated damages clause upheld.

District court properly found that the liquidated damages clause was enforceable under Georgia law as: (1) the district court rejected the buyer's challenges to the reasonableness of the $220,000 figure, finding that the amount selected appeared to be reasonably proportionate to the financial injury one might have expected from a breach on the part of the buyer; (2) the Georgia Supreme Court had found reasonable a forfeiture provision providing that a seller of real estate could have retained 10 percent of the purchase price upon the buyer's default; and (3) the agreement showed that the parties clearly contemplated, and intended, for the earnest money to be treated as liquidated damages in the event of a breach. Chandy

v. RaceTrac Petroleum, Inc., 2005 U.S. App. LEXIS 14368 (11th Cir. July 14, 2005) (Unpublished).

Liquidated damages provision in an employment contract was upheld because the employee's injury from the employer's breach was difficult to accurately estimate; the provision was clearly liquidated damages and not a penalty, particularly as it was designated as a liquidated damages provision; and the payments under the provision were reasonable estimates of the employee's probable losses upon the employer's termination or violation of the contract. McBride v. Mkt. St. Mortg., No. 07-8044, 2010 U.S. App. LEXIS 11191 (10th Cir. June 2, 2010) (Unpublished).

Liquidated damages clause in a hotel licensing agreement was enforceable under O.C.G.A. § 13-6-7 because the agreement was directly related to the past performance of the hotel by using a percentage of gross room revenue generated in the 36-month period prior to termination. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166 (2010).

Liquidated damages provision in an administrative services contract between a management company and health care companies was an enforceable penalty because: (1) the anticipated expenses for the new business venture could not have been easily calculated so that the injury caused by a breach of the contract was difficult to estimate with accuracy; (2) officers who helped negotiate the contract for both sides testified that the liquidated damages provision was meant to compensate the management company for lost revenues in the event of an early termination; and (3) the liquidated damages in the amount of fifty percent of remaining fees under the contract was a reasonable pre-estimate of probable loss. Mariner Health Care Mgmt. Co. v. Sovereign Healthcare, LLC, 306 Ga. App. 873, 703 S.E.2d 687 (2010).

13-6-11. Recovery of expenses of litigation generally.

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "Practice Point: Right of Publicity: A Practitioner's Enigma," see 17 J. Intell. Prop. L. 351 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Failure to prove amount of fees attributable to successful claim. — Because the evidence of attorney fees was in a lump sum and the plaintiff did not prove the amount of attorney fees attributable to the plaintiff's successful quantum meruit claim, the attorney fees award was reversed and remanded to allow the plaintiff to establish the amount of attorney fees attributable to the claim on which the plaintiff prevailed. Terrell v. Pippart, 314 Ga. App. 483, 724 S.E.2d 802 (2012).

Jury charges on attorney's fees under both O.C.G.A. §§ 13-6-11 and 51-7-81 improper. — Trial court erred in

charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

Underlying tort case must be successful. — When a plaintiff's tort claim for fraud fails, a derivative claim for attorney's fees also fails. Johnson v. Johnson, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Award granted via summary judgment was inappropriate. — Trial court erred by awarding attorney fees pursuant to O.C.G.A. § 13-6-11 on summary judgment because the trial court was without authority to award attorney fees on summary judgment since the issue of fees was for the trier of fact. Sherman v. Dickey, 322 Ga. App. 228, 744 S.E.2d 408 (2013).

Attorney fees not apportioned.

Award of attorneys' fees under O.C.G.A. § 13-6-11 to a broker in the broker's quantum meruit suit against a buyer was appropriate after the district court found that the buyer acted in bad faith, and an apportionment of the fees to account for the broker's unsuccessful claims was not appropriate because the district court made an explicit finding of bad faith. Litsky v. G.I. Apparel, Inc., No. 05-12351, 2005 U.S. App. LEXIS 22150 (11th Cir. Oct. 12, 2005) (Unpublished).

Inapplicable to divorce action. — There was no abuse of discretion in a trial court's denial of attorney fees to either party pursuant to O.C.G.A. § 19-6-2(a)(1) in their divorce action as the trial court properly based the court's determination upon consideration of the parties' relative financial positions; the husband could not seek attorney fees under O.C.G.A. § 13-6-11. Sponsler v. Sponsler, 287 Ga. 725, 699 S.E.2d 22 (2010).

Cited in Tyler v. Thompson, 308 Ga. App. 221, 707 S.E.2d 137 (2011); Ga. Dep't of Corr. v. Couch, 322 Ga. App. 234, 744 S.E.2d 432 (2013); Stoddard v. Greenberg, No. A12A0182, 2012 Ga. App. LEXIS 1083 (Apr. 25, 2012); Benchmark Builders, Inc. v. Schultz, 294 Ga. 12, 751 S.E.2d 45 (2013); Carroll v. Bd. of Regents of the Univ. Sys. of Ga., 324 Ga. App. 598, 751 S.E.2d 421 (2013).

Availability of Section to Defendants

Defendant's counterclaim not viable.

Trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable since as a compulsory counterclaim that arose out of the same facts as the complaint, the counterclaim was not independent and could not support an award of attorney fees under § 13-6-11; at the first trial, the tenant admitted and the evidence showed that it deducted a mistakenly-paid utility charges from a rent check and was due nothing under the counterclaim, and the tenant repeated those facts to the trial court during the second trial and explained that it was seeking recovery of attorney fees only. Sugarloaf Mills Ltd. P'ship v. Record Town, Inc., 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Application: In General

Attorney's fees not supportable without award of relief on underlying claim.

Because daughters were not awarded any damages in the year's support action, the daughters could not recover attorney fees pursuant to O.C.G.A. § 13-6-11. Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

School district employee who had been terminated from a position as a paraprofessional but had been reinstated during the pendency of the employee's suit alleging due process violations was not entitled to attorney's fees because the trial court properly determined that the employee's action was not an ex dilecto action entitling the employee to monetary damages, and without an award of monetary damages or other affirmative relief, there could be no award of attorney's fees. Boatright v. Glynn County Sch. Dist., 315 Ga. App. 468, 726 S.E.2d 591 (2012).

Computer contractor that failed to pre-

vail on the contractor's contract claim against a state agency based on sovereign immunity was not entitled to recover attorney's fees. Ga. Dep't of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Award vacated when underlying judgment reversed. — In a suit challenging a county board of commissioners' decision to abandon a road, since the decision in favor of the challengers setting aside the abandonment decision was reversed, the challengers were no longer the prevailing party and, therefore, the award of attorney fees in the challengers' favor under O.C.G.A. § 13-6-11 was vacated. Scarborough v. Hunter, 293 Ga. 431, 746 S.E.2d 119 (2013).

Application: Specific Examples

Not presumed trial court relied on statute. — Inasmuch as the trial court repeatedly cited O.C.G.A. § 9-15-14 and did not invoke or cite O.C.G.A.§ 13-6-11, it was not presumed the trial court relied on that statute to deny fees under O.C.G.A. § 9-15-14. O'Leary v. Whitehall Constr., 288 Ga. 790, 708 S.E.2d 353 (2011).

Attorney's fees in breach of contract suit.

Trial court did not err in directing a verdict against a bank on the bank's counterclaims for attorney fees because the counterclaims were based on having to defend against a complaint for breach of contract and wrongful foreclosure; since success on the bank's counterclaims would amount to a recovery of damages for merely having been sued by a corporation and the corporate owner, O.C.G.A. § 13-6-11 precluded the bank from recovering attorney fees. Canton Plaza, Inc. v. Regions Bank, Inc., 315 Ga. App. 303, 732 S.E.2d 449 (2012).

Trial court properly awarded attorney fees in the amount of $55,000 in a breach of contract case pursuant to O.C.G.A. § 13-6-11 in favor of plaintiff because the trial court had substantial evidence, including affidavits, testimony, and billing statements, concerning the proportion of fees expended on the breach of contract and rescission claims, and made an award within the range of the evidence before it. Fowler's Holdings, LLLP v. CLP Family Invs., L.P., 318 Ga. App. 73, 732 S.E.2d 777 (2012).

Basis for fees shown against property association on behalf of owners. — Trial court erred by granting summary judgment to a subdivision association on the lot owners' claim for attorney fees and litigation expenses under O.C.G.A. § 13-6-11 because the evidence showed that the association improperly conditioned the combination of the owners' lots on the owners' execution of an unnecessary affidavit and, after the owners sued the association, although the association eventually conceded that the association considered the lots combined, the association refused to adjust the setback lines unless and until the owners resubmitted the owners' plans. Henderson v. Sugarloaf Residential Prop. Owners Ass'n, 320 Ga. App. 544, 740 S.E.2d 273 (2013).

No fee in employer's claim for money hand and received. — Because an employer did not prevail on the employer's claims of money had and received, and unjust enrichment against a retired employee who was allegedly overpaid, the employer was not entitled to attorneys' fees and expenses pursuant to O.C.G.A. § 13-6-11. Graphic Packaging Holding Co. v. Humphrey, No. 10-12015, 2010 U.S. App. LEXIS 23718 (11th Cir. Nov. 16, 2010) (Unpublished).

Attorney's fees in landlord/tenant relationship. — Although a trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable, the error was harmless since attorney fees were authorized under an amended lease provision allowing attorney fees to the prevailing party; the landlord was not misled or denied the opportunity to defend or offer evidence on the issue because at the first trial, the tenant asserted that it was seeking attorney fees as the prevailing party, and at the second trial, the tenant stated in its opening statement that in addition to seeking attorney fees under § 13-6-11, it was seeking and introducing evidence of attorney fees as recoverable under the lease provision, and having failed to make a contemporaneous objection when the ar-

guments were raised and the evidence introduced, the landlord implicitly consented to the amendment of the pleadings to include the claim and waived any objections thereto. Sugarloaf Mills Ltd. P'ship v. Record Town, Inc., 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Homeowner's association not entitled to attorney's fees. — Because the original complaint for equitable relief did not put the homeowners on notice that the association was seeking attorney fees and expenses under O.C.G.A. § 13-6-11, and because the associations' claim for attorney fees and expenses was contained only in the association's amended complaint, the association was not entitled to a default judgment on that claim. Water's Edge Plantation Homeowner's Ass'n, Inc. v. Reliford, 315 Ga. App. 618, 727 S.E.2d 234 (2012).

Actions based on insurer's bad faith refusal to pay insurance claim.

Mortgagee's claim for expenses of litigation, including attorney fees under O.C.G.A. § 13-6-11 was not authorized in the mortgagee's action against an insurer seeking payment of insurance proceeds because the penalties contained in O.C.G.A. § 33-4-6 were the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds. Balboa Life & Cas., LLC v. Home Builders Fin., 304 Ga. App. 478, 697 S.E.2d 240 (2010).

Attorney's fees in piercing corporate veil. — Because a corporation's officers abused the corporate form and disregarded the corporation's separateness by commingling properties, failed to observe corporate formalities, undercapitalized the corporation, and committed fraud at a real estate closing, a trial court did not err in holding the officers liable for a judgment against the corporation obtained by homeowners and in ordering the homeowners to pay the homeowners' attorney fees. Christopher v. Sinyard, 313 Ga. App. 866, 723 S.E.2d 78 (2012).

Bad faith breach of construction contract. — Trial court did not err in denying homeowners' motion for directed verdict and allowing the issue of attorney fees to go to the jury because there was evidence from which the jury could have concluded that the homeowners willfully failed to disclose and/or misrepresented to a builder certain construction costs that otherwise should have been included in the calculation of the builder's compensation; that evidence would authorize a finding of something other than a good-faith belief on the part of the homeowners that the builder was asking the homeowners to pay more than the homeowners were contractually obligated to pay. Harris v. Tutt, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

Fees when class action more profitable than action by individual. — Because the precatory nature of attorneys' fees under O.C.G.A. § 13-6-11 did not provide the same incentive for an attorney to represent an individual plaintiff as the automatic, or likely, award of fees and costs available to a prevailing plaintiff under statutes that mandated an award of attorneys' fees, the court concluded that plaintiff consumer would probably be unable to secure adequate representation to prosecute the plaintiff's claims were a class action waiver found in the plaintiff's banking services agreement to be enforced because the potential of the plaintiff's individual recovery was too small. Gordon v. Branch Banking & Trust, No. 09-15399, 2011 U.S. App. LEXIS 6275 (11th Cir. Mar. 28, 2011) (Unpublished).

Attorney's fees in bankruptcy action. — Chapter 7 debtor was collaterally estopped from relitigating a creditor's claim for a determination of nondischargeability per 11 U.S.C. § 523(a)(6) of a state court judgment for damages for malicious prosecution and intentional infliction of emotional distress because the state court litigation met all of the requirements for the application of that doctrine. Moreover, the nondischargeable debt included amounts awarded as attorneys fees per O.C.G.A. § 13-6-11. Kasper v. Turnage (In re Turnage), 460 B.R. 341 (Bankr. N.D. Ga. 2011).

Although term "bad faith" in Georgia statute allowing for recovery of attorney's fees did not per se equate to a deliberate or willful injury, facts found by an arbitrator formed the basis for a nondischargeability judgment under the Bankruptcy Code. Arbitrator's findings that debtor intentionally failed to bill and

collect from the debtor's patients and that the debtor shredded patient files were sufficient for the bankruptcy court to conclude that the debtor willfully intended to injure the creditor and that the debtor's actions were malicious, wrongful, and without just cause. Tenet S. Fulton, Inc. v. Demps (In re Demps), 506 B.R. 163 (Bankr. N.D. Ga. 2014).

Negligence suit involving contested amount of damages and proximate cause. — Trial court did not err in refusing to submit plaintiffs' claim under O.C.G.A. § 13-6-11 for attorney fees to the jury because the record showed that a bona fide controversy existed throughout the litigation, the record contained evidence that defendants genuinely disputed the amount of plaintiffs' damages and the issue of the proximate cause of certain injuries, and there was no evidence that defendants forced plaintiffs to resort to litigation or caused them unnecessary trouble and expense. Horton v. Dennis, 325 Ga. App. 212, 750 S.E.2d 493 (2013).

Fees in dispute over repairs of vehicle. — Truck repairer's failures to repair an owner's truck to the owner's satisfaction or to agree on a trade-in price for the truck could not have justified the submission of attorney fees to the jury pursuant to O.C.G.A. § 13-6-11, such that the trial court properly granted a directed verdict under O.C.G.A. § 9-11-50 to the repairer. Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc., 311 Ga. App. 138, 714 S.E.2d 750 (2011).

General contractor prevailing in federal claim. — To the extent the general contractor prevailed on the contractor's 11 U.S.C. § 523(a)(2)(A) claim and could establish circumstances that O.C.G.A. § 13-6-11 specified, the general contractor could recover attorney's fees. Hensler & Beavers Gen. Contrs., Inc. v. Sanford (In re Sanford), No. 11-4063, 2011 Bankr. LEXIS 5222 (Bankr. N.D. Ga. Dec. 22, 2011).

Attorney's fees award not supported.

Investment bank partner was not entitled to attorney fees predicated on the successful prosecution of the investment bank partner's guaranty counterclaim against a partner who guaranteed the partnership's debts to the investment bank partner because the trial court properly granted summary judgment to the guaranty partner on the guaranty counterclaim and a bona fide controversy existed as to the investment bank partner's breach of fiduciary duty counterclaim. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Trial court erred when the court awarded the decedent's estate the attorney fees that were expended in a previous will contest in another court as no determination for the fees was made in that court. In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011).

In a breach of contract action by a city against the Georgia Interlocal Risk Management Agency, the trial court did not err in denying the city's claim for attorney fees because the city failed to show that it was entitled to such fees under O.C.G.A. § 13-6-11, given that it was not entitled to an award of damages on the underlying claim. City of College Park v. Georgia Interlocal Risk Mgmt. Agency, 313 Ga. App. 239, 721 S.E.2d 97 (2011).

Indemnity provision in a title insurance agency agreement did not expressly provide for attorney fees; because attorney fees were not recoverable absent an express provision in the contract, the title insurer was not entitled to summary judgment on the insurer's claim for attorney's fees against the closing attorney. Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 754 S.E.2d 85 (2013).

Expenses of litigation not recoverable in conjunction with compulsory counterclaim. — Defendant could not recover its expenses of litigation under O.C.G.A. § 13-6-11 in conjunction with its counterclaim for improper retention of property, because that claim was clearly a compulsory counterclaim. Tri-State Consumer Ins. Co. v. LexisNexis Risk Solutions, Inc., No. 1:11-cv-1313-TCB, 2012 U.S. Dist. LEXIS 61768 (N.D. Ga. May 3, 2012).

Expenses of litigation recoverable in the absence of a claim for damages. — Defendant could recover expenses of litigation in connection with a substantive claim that sought only an injunction and specific performance rather than damages

because Georgia law clearly authorized the recovery of attorney's fees under O.C.G.A. § 13-6-11 in connection with claims that sought equitable, and not just legal, relief. Tri-State Consumer Ins. Co. v. LexisNexis Risk Solutions, Inc., No. 1:11-cv-1313-TCB, 2012 U.S. Dist. LEXIS 61768 (N.D. Ga. May 3, 2012).

Expenses of litigation not recoverable for conduct during course of litigation. — Defendant could not recover expenses of litigation as a result of plaintiff's having allegedly asserted baseless claims because such conduct occurred during the course of the litigation rather than in connection with the transactions underlying the litigation. Tri-State Consumer Ins. Co. v. LexisNexis Risk Solutions, Inc., No. 1:11-cv-1313-TCB, 2012 U.S. Dist. LEXIS 61768 (N.D. Ga. May 3, 2012).

Bad Faith, Fraud, and Deceit

Bad faith in original cause of action.

Trial court did not err by denying a former employee benefits plan administrator's motions for judgment as a matter of law on a client's claim for litigation expenses under O.C.G.A. § 13-6-11 because there was evidence that the administrator acted in bad faith; the evidence also authorized the jury to find that the administrator's fraud hindered the client from discovering the client's cause of action because there was evidence that a close scrutiny of the administrator's invoices would not have disclosed the cause of action. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Bad faith may be found despite existence of bona fide controversy.

Award of attorneys' fees under O.C.G.A. § 13-6-11 to a broker in the broker's quantum meruit suit against a buyer was appropriate, even if a bona fide controversy existed, since the district court specifically found that the buyer acted in bad faith, was stubbornly litigious, and caused the broker unnecessary expense and trouble. Litsky v. G.I. Apparel, Inc., No. 05-12351, 2005 U.S. App. LEXIS 22150 (11th Cir. Oct. 12, 2005) (Unpublished).

Store acted in bad faith following slip and fall accident. — In a slip and fall case, the trial court properly concluded that the store acted in bad faith because the manager did not follow store policy, failed to preserve videos of the accident, and then manipulated the evidence by changing the direction in which the cameras were pointed; because the spoliation of evidence prejudiced the customer by causing the customer the unnecessary expense of bringing a lawsuit when the videos might have shown there was no dispute as to the store's liability, the trial court did not err by denying the store's motion for a directed verdict on the issue of attorney fees and expenses of litigation under O.C.G.A. § 13-6-11. The Kroger Co. v. Walters, 319 Ga. App. 52, 735 S.E.2d 99 (2012).

Evidence sufficient to award attorney's fees.

Trial court erred in dismissing a camp's claims for attorney fees and expenses of litigation because there was some evidence from which the jury could determine that a marina acted in bad faith during the erection of a dock; although the marina knew that the camp opposed having the dock on their property, the marina took no action to remove it. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

Application of Bad Faith, Fraud, and Deceit

Bad faith in sale of company.

Plaintiffs failed to demonstrate that genuine issues of material fact existed with respect to the defendant's alleged breach of a contract to purchase a hospital; there was likewise no evidence that the defendant acted in bad faith, was stubbornly litigious, or caused the plaintiffs unnecessary trouble and expense, so summary judgment on the issue of attorney's fees was warranted. St. Joseph Hosp. v. Health Mgmt. Assocs., No. 107-104, 2011 U.S. Dist. LEXIS 33715 (S.D. Ga. Mar. 30, 2011).

Bad faith in sale of used medical equipment. — Debtor established that the debtor was entitled to damages for tortious interference with the debtor's resale of medical equipment from defendant manufacturers. Bad faith under O.C.G.A. § 13-6-11 required more than bad judg-

ment or negligence, but debtor established a dishonest purpose and breach of known duty. Bailey v. Hako-Med USA, Inc. (In re Bailey), No. 09-4002, 2010 Bankr. LEXIS 6300 (Bankr. S.D. Ga. Nov. 16, 2010).

Bad faith not shown in suit involving auto repairs. — In a suit for fraud and other claims, the trial court erred by denying the defendants' motions for a directed verdict and judgment notwithstanding the verdict on the issue of attorney fees because the record made clear that there was a bona fide controversy regarding the defendants' liability since the evidence did not demand a finding that the defendants were negligent or that any negligence was the sole cause of the plaintiff's damages; thus, the plaintiff was not entitled to attorney fees under O.C.G.A. § 13-6-11. Vol Repairs II, Inc. v. Knighten, 322 Ga. App. 416, 745 S.E.2d 673 (2013).

Bad faith in breach of promise to marry. — Because a mother presented some evidence to show that the father of her child acted in bad faith in connection with his promise to marry, given that he was involved in another relationship at the time he proposed and gave her a $10,000 ring, an award of $6,500 in attorney fees was upheld. Kelley v. Cooper, 325 Ga. App. 145, 751 S.E.2d 889 (2013).

Bad faith in real estate contract.

In a construction company's breach of contract suit against a realty company and the company's principal, the realty company was liable for attorney's fees based on the finding that the company acted in bad faith because the record supported the conclusion that the realty company and the company's employees manipulated the construction company into doing a great deal of work that was clearly beyond the written contract with the principal and, despite the construction company's reasonable expectations that the company would be paid for the work, the realty company then attempted to shield itself behind the written contract. Circle Y Constr., Inc. v. WRH Realty Servs., No. 10-13746, 2011 U.S. App. LEXIS 10629 (11th Cir. May 24, 2011) (Unpublished).

Bad faith of member of limited liability company. — In an action involving the judicial dissolution of a limited liability company, the evidence supported the trial court's finding that an award of attorney fees was warranted pursuant to O.C.G.A. § 13-6-11 when the trial court determined that a member of the company had acted in bad faith, was stubbornly litigious, and had caused the other member unnecessary trouble and expense. Moses v. Pennebaker, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Inconsistent standards in applying bad faith in executors' request. — Trial court erred in denying the executors' request for attorney fees because the trial court applied inconsistent standards with regard to the request under O.C.G.A. § 13-6-11 based on enforcing a consent order and an award under O.C.G.A. § 9-15-14(a) and (b) for bad faith; thus, a remand was necessary for reconsideration of the issue. Haney v. Camp, 320 Ga. App. 111, 739 S.E.2d 399 (2013).

Trespass.

Jury's award of attorney fees and expenses was authorized under O.C.G.A. § 13-6-11 because bad faith existed as a neighbor's trespass onto an adjacent owner's property was both knowing and willful. The neighbor trespassed onto the owner's adjacent property by tying into the owner's sewer line without the owner's permission. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Bad faith in trespass and nuisance suit.

Trial court erred by granting summary judgment to neighbors on attorney fees in property owners' action to recover damages arising from smoke emanating from the neighbors outdoor fireplace because the evidence was sufficient to submit the issue of attorney fees to the jury; the neighbors knew that the smoke was still infiltrating the owners' home and, nevertheless, proceeded to burn wood in the neighbors' fireplace. Weller v. Blake, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

Trial court erred by granting an apartment owner summary judgment on the issue of attorney fees because although there was some evidence from which the jury could find that after a property owner notified the apartment owner of a possible

nuisance prior to filing the lawsuit, the apartment owner failed to take any action to remedy the alleged increase flow of storm water runoff from the detention ponds. Haarhoff v. Jefferson at Perimeter L.P., 315 Ga. App. 271, 727 S.E.2d 140 (2012).

Homeowners not entitled to bad fatih attorney fees. — Homeowners' claim for statutory bad faith attorney fees was properly resolved by a grant of summary judgment against the homeowners with respect to substantive claims that were resolved against the homeowners in a dispute with the homeowner's association. Indeed, there was a bona fide controversy regarding whether the claims had merit; accordingly, the association was not stubbornly litigious and did not cause unnecessary trouble and expense. McGee v. Patterson, 323 Ga. App. 103, 746 S.E.2d 719 (2013).

Bad faith in attorney's representation of client.

Trial court did not err in awarding summary judgment to an attorney and a law firm in a former client's legal malpractice action seeking attorney fees because the client pointed to no evidence that would support an award of attorneys' fees but instead referred generally to the acts and/or omissions made by the attorney and the firm in the representation of the client; the client did not point to any evidence that would support an award of attorneys' fees on the grounds of stubborn litigiousness and unnecessary trouble and expense. Duncan v. Klein, 313 Ga. App. 15, 720 S.E.2d 341 (2011).

Attorney's fees awarded in error.

Evidence did not support the award of attorneys' fees in favor of a truck driver because there was a genuine dispute about the amount of lost earnings the truck driver was entitled to recover. French v. Dilleshaw, 313 Ga. App. 834, 723 S.E.2d 64 (2012).

No bad faith justifying attorney's fees award. — As there was no evidence that a guarantor breached the guaranty in bad faith or otherwise acted in bad faith in the contractual relations underlying the cause of action, it was error to grant the materials supplier a bad faith attorney fee award; further, the guarantor's post-trial relief motion should have been granted. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230 (2013).

Evidence of bad faith sufficient to award attorney's fees.

While plaintiff firm was awarded only $325 in compensatory damages, in Georgia, there was no proportionality requirement between attorney's fees and compensatory damages if bad faith was shown under O.C.G.A. § 13-6-11, and since defendant convention host interfered with sales leads from another company, allowing $517,168 in fees was not error. GT Software, Inc. v. webMethods, Inc., No. 10-15423; No. 10-15628, 2012 U.S. App. LEXIS 4483 (11th Cir. Mar. 5, 2012) (Unpublished).

Stubborn Litigiousness

No recovery when bona fide claim exists.

Probate court erred by ordering two co-executors to pay attorney fees to another co-executor on the ground that they had been stubbornly litigious for refusing to accept that to which they had agreed in the settlement agreement because a bona fide controversy existed as to the intermediate discounts in the equalization calculation and when a bona fide controversy exists, there can be no stubborn litigiousness as a matter of law. In re Estate of Hubert, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

Evidence supported award, etc.

Evidence supported the jury's award of attorney fees under O.C.G.A. § 13-6-11 in homeowners' class action against a private water system owner because the owner adopted the position that the homeowners were obligated to remain connected to the owner's water system and pay the owner a minimum monthly connection fee only after the owner's efforts to keep those customers failed, and the vast majority of homeowners opted to go with the county system, and the jury could rely on that evidence to find that the owner had been stubbornly litigious or had caused the class unnecessary trouble and expense; the statute contemplates that the facts in any given case may support an award of attorney fees, even if the case is resolved at trial, rather than by summary

adjudication. Jones v. Forest Lake Vill. Homeowners Ass'n, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Defendant was not stubbornly litigious. — Given the complexity of the transactions and the court's finding that defendant acted appropriately in many circumstances, the court could not find that defendant was stubbornly litigious or caused plaintiff unnecessary trouble and expense; while defendant's actions could have supported a finding of bad faith under O.C.G.A. § 13-6-11, the court declined to award attorneys' fees. The evidence showed that plaintiff also acted recalcitrantly and made excessive demands and that defendant made multiple efforts to settle the matter short of litigation; the award in this case was sufficient under the circumstances. Pollitt v. McClelland (In re McClelland), No. 09-9030-WLH, 2011 Bankr. LEXIS 2224 (Bankr. N.D. Ga. June 8, 2011).

Summary judgment denied because issues of fact exist.

As a doctor was terminated wrongfully and without authority from a medical practice, and there was evidence that the practice acted in bad faith and was stubbornly litigious, the trial court properly denied summary judgment to the practice on the doctor's claim for statutory bad faith fees and expenses. Ga. Dermatologic Surgery Ctrs., P.C. v. Pharis, 323 Ga. App. 181, 746 S.E.2d 678 (2013).

Unnecessary Trouble and Expense

Counsel's role in document review involving spoliation. — Trial court did not err in denying defendant's motion in limine to preclude plaintiffs' counsel from testifying at trial as to what occurred during a May 2009 document review involving spoliation because the evidence was properly admitted as it related to the issue of attorney fees since plaintiffs sought expenses of litigation and attorney fees under O.C.G.A. § 13-6-11; thus, the testimony was relevant. Pulte Home Corp. v. Simerly, 322 Ga. App. 699, 746 S.E.2d 173 (2013).

Pleadings and Practice

Fees under O.C.G.A. § 13-6-11 cannot be awarded via summary judgment. — Trial court erred by granting summary judgment to a landlord for attorney fees under O.C.G.A. § 13-6-11 because the language of § 13-6-11 prevents a trial court from ever determining that a claimant is entitled to attorney fees as a matter of law and although the trial court may grant attorney fees or litigation expenses under § 13-6-11 when the court sits as the trier of fact, the court is not a trier of fact on a motion for summary judgment. Meek v. Mallory & Evans, Inc., 318 Ga. App. 407, 734 S.E.2d 109 (2012).

No ante litem notice for claim for attorney fees and costs. — Firefighters' request for costs of litigation, including attorney fees, was properly submitted to the jury in the firefighters' class action, challenging a promotional examination, as the firefighters were not statutorily required to give ante-litem notice to the city. City of Atlanta v. Bennett, 322 Ga. App. 726, 746 S.E.2d 198 (2013).

Waiver of objection to award of fees. — To the extent that an attorney fee award to homeowners was based on O.C.G.A. § 13-6-11, the builder had not waived the builder's right to object to the award by failing to object to the verdict form because the verdict was void due to the homeowners' failure to recover any affirmative relief. However, the Court of Appeals failed to consider the owners' alternative argument that the award was based on contract, in which case the builder could have waived the builder's right to object, requiring remand. Benchmark Builders, Inc. v. Schultz, 289 Ga. 329, 711 S.E.2d 639 (2011).

Lender's demand letter for fees sufficient. — Lender's demand letter that referenced the note signed by the borrower and advised a guarantor of the lender's intent to seek attorney's fees if the debt was not paid within ten days was sufficient, although the letter did not cite to O.C.G.A. § 13-6-11 or the specific section of the note allowing attorney's fees. Brzowski v. Quantum Nat'l Bank, 311 Ga. App. 769, 717 S.E.2d 290 (2011).

Award of attorney's fees part of underlying case. — Trial court erred in denying the children's petition for writ of mandamus to compel a judge to allow the children to appeal from the order dismiss-

ing their appeals because the award of attorney fees under O.C.G.A. § 13-6-11 was considered part of the underlying case; therefore, if the judgment reserves the issue of attorney fees under § 13-6-11, then one cannot claim that "the case is no longer pending in the court below" as required by O.C.G.A. § 5-6-34(a)(1). Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Award vacated. — Trial court award of attorney fees under O.C.G.A. § 13-6-11 to a bank was reversed on appeal since the appellate court determined that summary judgment should not have been granted to the bank as a result of genuine issues of fact existing as to the interpretation of the contract at issue. DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013).

Evidentiary Issues

Award of attorney's fees should be affirmed, etc.

Trial court did not err in a breach of contract suit when the court granted the plaintiff $55,000 in attorney fees under O.C.G.A. § 13-6-11 because the trial court had substantial evidence, including affidavits, testimony, and billing statements, concerning the proportion of fees expended on the breach-of-contract and rescission claims, and made an award within the range of the evidence presented. Fowler's Holdings, LLLP v. CLP Family Invs., L.P., 318 Ga. App. 73, 732 S.E.2d 777 (2012).

Jury-Court Determinations

Question of attorney fees under O.C.G.A. § 13-6-11 is question for jury.

Pursuant to the language of O.C.G.A. § 13-6-11, a trial court erred when the court granted a tenant attorney fees thereunder as a matter of law on a summary judgment ruling as the determination of the fee issue was one within the province of the jury. Covington Square Assocs., LLC v. Ingles Mkts., 287 Ga. 445, 696 S.E.2d 649 (2010).

Trial court erred in granting attorney fees pursuant to O.C.G.A. § 13-6-11 on summary judgment because both the liability for and amount of attorney fees pursuant to § 13-6-11 were issues solely for a jury's determination. The trial court did not sit as a trier of fact on a motion for summary judgment. Crouch v. Bent Tree Cmty., 310 Ga. App. 319, 713 S.E.2d 402 (2011).

Given the preference under Georgia law for jury resolution of a claim for fees under O.C.G.A. § 13-6-11, and the open question of whether a jury would award damages to plaintiff on the plaintiff's breach of contract claim, the defendants' motion for summary judgment on plaintiff's claim for fees was denied. However, summary judgment was granted in favor of the defendants on the plaintiff's claim for fees under O.C.G.A. § 9-15-14, as that provision was not available to civil litigants in federal court. Jackson v. JHD Dental, LLC, No. 1:10-CV-00173-JEC, 2011 U.S. Dist. LEXIS 63015 (N.D. Ga. June 14, 2011).

No right to have attorney fee issue decided by jury.

Trial court properly denied a title insurance company's motion for summary judgment on the issue of attorney fees under O.C.G.A. § 13-6-11 because the indemnity provision in the agency agreement at issue did not expressly provide for attorney fees. Doss & Assocs. v. First Am. Title Ins. Co., 2013 Ga. App. LEXIS 968 (Nov. 21, 2013).

Trial court erred in granting summary judgment as to availability of fees. — Language of O.C.G.A. § 13-6-11 prevented a trial court from ever determining that a claimant is entitled to attorney fees as a matter of law. Whether the plaintiff had met any of the preconditions for an award of attorney fees and expenses was solely a question for the jury as was the amount of fees and expenses. Royal v. Blackwell, 289 Ga. 473, 712 S.E.2d 815 (2011).

Bad faith for jury determination. — Trial court did not err in denying summary judgment to a management company on a health care companies' claim for attorney's fees for bad faith under O.C.G.A. § 13-6-11 because questions concerning bad faith under § 13-6-11 were generally for the jury to decide. Mariner Health Care Mgmt. Co. v. Sovereign Healthcare, LLC, 306 Ga. App. 873, 703 S.E.2d 687 (2010).

13-6-13. Recovery of interest upon damages.

Law reviews. — For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

JUDICIAL DECISIONS

Prejudgment interest award was proper.

In breach-of-contract actions in all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time until the recovery. Goody Prods. v. Dev. Auth. of Manchester, 320 Ga. App. 530, 740 S.E.2d 261 (2013).

Damages for time value of money. — In a breach of trust action, the jury properly included "damages for the time value of money" as part of the measure of damages. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

CHAPTER 7

SETOFF AND RECOUPMENT

13-7-1. Nature of setoff generally.

JUDICIAL DECISIONS

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., 315 Ga. App. 539, 726 S.E.2d 608 (2012).

13-7-2. Nature of recoupment generally.

JUDICIAL DECISIONS

Analysis

Application

Application

Contract dispute between founder and corporation. — In a founder's contract dispute against a corporation, neither party could be said to have not complied with the cross-obligations or independent covenants, because none existed since the contract conceived of a single obligation, the corporation paid the founder in full on the single obligation in dispute. Stewart v. Hooters of Am., Inc., No. 10-11609, 2011 U.S. App. LEXIS

13275 (11th Cir. June 28, 2011) (Unpublished).

13-7-4. Limitations as to claims or demands for setoff generally.

JUDICIAL DECISIONS

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., 315 Ga. App. 539, 726 S.E.2d 608 (2012).

CHAPTER 8

ILLEGAL AND VOID CONTRACTS GENERALLY

Article 1

General Provisions

Article 4

Restrictive Covenants in Contracts

ARTICLE 1

GENERAL PROVISIONS

13-8-1. Contracts to do immoral or illegal things.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Illegality Collateral to Contract

Meretricious relationship defense did not apply to a promise to marry. — Because the object of a promise to marry was not illegal or against public policy, O.C.G.A. § 19-3-6, the fact that a man and woman were living together before and after a marriage proposal was only collateral to the promise to marry, and the meretricious relationship defense provided by O.C.G.A. § 13-8-1 was inapplicable to the promise to marry. Kelley v. Cooper, 325 Ga. App. 145, 751 S.E.2d 889 (2013).

Illegal Contracts

Agreement in violation of statutory requirements void.

Agreement between a county and a developer was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 because the agreement violated the prohibition in O.C.G.A. § 36-71-4(d) against the prepayment of impact fees; the agreement calculated the payment of impact fees not in reference to the issuance of building permits but as a sum certain for the purpose of retiring the county's debt for improving the county's water/sewer system. Effingham County Bd. of Comm'rs v. Park West Effingham, L.P., 308 Ga. App. 680, 708 S.E.2d 619 (2011).

Application

Contract as to reimbursement of medical services. — Workers' compensation insurers/payors were not entitled to dismissal of a breach of contract claim by medical care providers as the claim provided fair notice of the allegations, and the contract rights did not violate any law or public policy with respect to assertions as to promised reimbursement rates for services provided. Aetna Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga. App. 641, 746 S.E.2d 148 (2013).

Collection of tax issue moot. — Trial court's reaching a determination that contracts were void was improper because the trial court was not called upon to decide whether various contracts were enforceable. However, because the injunction imposed by the court provided for the proper collection and remittance of a city's hotel occupancy taxes should online travel companies elect to continue to act as third-party tax collectors, the error was effectively moot and provided no basis for reversal. City of Atlanta v. Hotels.com, 289 Ga. 323, 710 S.E.2d 766 (2011).

Alleged illegal rebate provision was severable from an agency contract. — Trial court properly denied a real estate firm's motion for summary judgment on the grounds of illegality of the agency contract because the alleged offending rebate provision was severable from the contract and, therefore, did not render the entire agency contract void and unenforceable. Dewrell Sacks, LLP v. Chi. Title Ins. Co., 324 Ga. App. 219, 749 S.E.2d 802 (2013).

13-8-2. Contracts contravening public policy generally.

(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

(1) Contracts tending to corrupt legislation or the judiciary;

(2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;

(3) Contracts to evade or oppose the revenue laws of another country;

(4) Wagering contracts; or

(5) Contracts of maintenance or champerty.

(b) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy. (Orig. Code 1863, § 2714; Code 1868, § 2708; Code 1873, § 2750; Code 1882, § 2750; Civil Code 1895, § 3668; Civil Code 1910, § 4253; Code 1933, § 20-504; Ga. L. 1970, p. 441, § 1; Ga. L. 1982, p. 3, § 13; Ga. L. 1989, p. 14, § 13; Ga. L. 1990, p. 1676, § 1; Ga. L. 2007, p. 208, § 1/HB 136; Ga. L. 2009, p. 231, § 1/HB 173; Ga. L. 2011, p. 399, § 2/HB 30.)

The 2011 amendment, effective May 11, 2011, in subsection (a), substituted "that" for "which" in the first sentence of paragraph (a)(1) and substituted "contracts which restrict certain competitive activities, as provided in Article 4 of this chapter" for "contracts in partial restraint of trade as provided for in Code Section 13-8-2.1" in paragraph (a)(2). See editor's note for applicability.

Editor's notes. — Ga. L. 2009, p. 231, § 4, not codified by the General Assembly, provides that the 2009 amendment becomes effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this amendment shall stand automatically repealed. The constitutional amendment (Ga. L. 2010, p. 1260) was ratified at the general election held on November 2, 2010.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No.

64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to contracts entered into on and after May 11, 2011, and shall not apply in actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

Law reviews. — For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 21 (2011). For annual survey on construction law, see 64 Mercer L. Rev. 71 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration

Agreement between county and developer void. — Agreement between a county and a developer was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 because the agreement violated the prohibition in O.C.G.A. § 36-71-4(d) against the prepayment of impact fees; the agreement calculated the payment of impact fees not in reference to the issuance of building permits but as a sum certain for the purpose of retiring the county's debt for improving the county's water/sewer system. Effingham County Bd. of Comm'rs v. Park West Effingham, L.P., 308 Ga. App. 680, 708 S.E.2d 619 (2011).

Contract as to reimbursement of medical services. — Workers' compensation insurers/payors were not entitled to dismissal of a breach of contract claim by medical care providers as the claim provided fair notice of the allegations, and the contract rights did not violate any law or public policy with respect to assertions as to promised reimbursement rates for services provided. Aetna Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga. App. 641, 746 S.E.2d 148 (2013).

Cited in Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

1. What Contravenes Public Policy

Attorney fee arrangements. — Because the interest in a fee award held by appellee, a law firm's former attorney, existed prior to the law firm's later assignment of its interest to appellant assignee, and the attorney's interest could not have been assigned by the firm as it belonged to the attorney personally, the attorney had an enforceable contractual interest in the attorney's percentage and the attorney was protected by O.C.G.A. § 15-19-14's attorney lien; the attorney had already sold the attorney's shares in the law firm and had entered into an attorney-client relationship with the class action plaintiffs before the law firm was associated with the class action and before the law firm assigned the firm's interest in the fees to the assignee, and the fact that the case involved an attorney-client relationship did not mean that the Georgia Disciplinary Standards and the Georgia Rules of Professional Conduct preempted O.C.G.A. § 13-8-2(a) as to public policy and case law that parties were free to contract about any subject matter, on any terms, unless prohibited by statute or public policy, and injury to public interest clearly appeared. R.D. Legal Funding

Partners, LP v. Robinson, No. 11-12190, 2012 U.S. App. LEXIS 8074 (11th Cir. Apr. 18, 2012) (Unpublished).

Contingency fee agreement. — Fee-splitting agreements between a law firm, whose representation of the clients was terminated by the clients, and another lawyer could not be enforced so as to permit the law firm to receive a portion of a contingent fee when the termination occurred before the fee was earned. To allow the discharged attorney to collect a share of the contingent fee after being discharged would contravene Ga. St. Bar R. 4-102(d):1.5(e)(2), and therefore would be against public policy and unenforceable under O.C.G.A. § 13-8-2(a). Eichholz Law Firm, P.C. v. Tate Law Group, LLC, 310 Ga. App. 848, 714 S.E.2d 413 (2011), cert. denied, No. S11C1809, 2011 Ga. LEXIS 982; cert. denied, Weinstock & Scavo, P.C. v. Tate Law Group, LLC, No. S11C11812, 2011 Ga. LEXIS 989 (Ga. 2011).

Indemnity clause valid. — O.C.G.A. § 13-8-2 and public policy did not apply to bar a city's indemnity claims against the city's contractors for meter-reading software in a suit brought by city water customers based on claims that the city overcharged the customers for water and sewage service because the customers' claims were not for injury to person or property. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Exculpatory Clauses

Indemnity clause void and unenforceable.

Applying the reference in O.C.G.A. § 13-8-2(b) (amended effective July 1, 2007) to "the construction, alteration, repair, or maintenance of a building structure, appurtenances, or appliances, including moving, demolition, and excavating connected therewith" liberally in the case, the developer's work on the subdivision property and the detention pond and its spillway fell within the ambit of § 13-8-2(b), and it followed that, because the assignment and assumption agreement directly related to such work by purportedly indemnifying the developer for any liability arising from it, § 13-8-2(b) applied to the agreement. Moreover, because the indemnification provision improperly shifted all of the developer's liability to the homeowners' association, even for claims based solely upon the developer's actions or omissions, the indemnification provision of the assignment and assumption agreement was void and unenforceable under § 13-8-2(b), and the trial court erred in denying the association's motion for summary judgment on the developer's third party complaint against the homeowners' association for indemnification. Newton's Crest Homeowners' Ass'n v. Camp, 306 Ga. App. 207, 702 S.E.2d 41 (2010).

Georgia's anti-indemnity statute for construction contracts, O.C.G.A. § 13-8-2(b), applied to invalidate an indemnification clause within an assignment and assumption agreement transferring responsibility for the management and operation of a newly developed subdivision to its homeowners' association. Kennedy Dev. Co. v. Camp, 290 Ga. 257, 719 S.E.2d 442 (2011).

Trial court properly granted a homeowners' association summary judgment and dismissed a development company's third-party complaint asserting indemnity because in the main litigation the indemnity agreement was invalidated under O.C.G.A. § 13-8-2(b); thus, the third-party complaint was barred by res judicata. Kennedy Dev. Co. v. Newton's Crest Homeowners' Ass'n, 322 Ga. App. 39, 743 S.E.2d 600 (2013).

13-8-2.1. Contracts in partial restraint of trade.

Repealed by Ga. L. 2011, p. 399, § 3/HB 30, effective May 11, 2011.

Editor's notes. — This Code section was based on Code 1981, § 13-8-2.1, enacted by Ga. L. 1990, p. 1676, § 2; Ga. L. 1991, p. 94, § 13; Ga. L. 2009, p. 231, § 2/HB 173.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that

dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the repeal of this Code section shall apply to contracts entered into on and after May 11, 2011, and shall not apply in actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

Law reviews. — For note, "Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts," 46 Ga. L. Rev. 1117 (2012).

ARTICLE 4

RESTRICTIVE COVENANTS IN CONTRACTS

Effective date. — This article became effective May 11, 2011.

Editor's notes. — Ga. L. 2009, p. 231, § 4, not codified by the General Assembly, provides that the 2009 enactment of this article becomes effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this article shall stand automatically repealed. The constitutional amendment (Ga. L. 2010, p. 1260) was ratified at the general election held on November 2, 2010.

The former article consisted of Code Sections 13-8-50 through 13-8-59, relating to restrictive covenants in contracts, was repealed by Ga. L. 2011, p. 399, § 4, effective May 11, 2011, and was based on Code 1981, §§ 13-8-50 — 13-8-59, enacted by Ga. L. 2009, p. 231, § 3/HB 173.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the enactment of this article shall apply to contracts entered into on and after May 11, 2011, and shall not apply in

actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

Law reviews. — For article, "Georgia Gets Competitive," see 15 (No. 4) Ga. St. B.J. 13 (2009). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010). For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 21 (2011).

13-8-50. Legislative findings.

The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions. (Code 1981, § 13-8-50, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U.L. Rev. 21 (2011). For annual survey on labor and employment law, see 64 Mercer L. Rev. 173 (2012).

For note, "Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts," 46 Ga. L. Rev. 1117 (2012).

JUDICIAL DECISIONS

Enforcement of covenants would be against Georgia law and public policy. — Trial court did not err by refusing to enforce the forum selection and choice of law clauses requiring Texas law to govern an employment contract and by dismissing the complaint because a Texas court applying Texas law would enforce non-compete covenants that were unenforceable under applicable Georgia law and public policy. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467 (2013).

In a declaratory judgment action seeking a declaration as to the enforceability of non-compete clauses in an employment contract, the trial court properly granted the competitor judgment on the pleadings because the trial court correctly found that the pleadings showed that the lack of any limit on the scope of the restricted work or the solicitation of former customers were void and unenforceable under the non-severability rule as a matter of law. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467 (2013).

Cited in Crump Ins. Servs. v. All Risks, Ltd., 315 Ga. App. 490, 727 S.E.2d 131 (2012).

13-8-51. Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with another person or entity;

(B) Any entity of which a person is an officer, director, or partner or holds an equity interest or ownership position that accounts for 25 percent or more of the voting rights or profit interest of such entity;

(C) Any trust or other estate in which the person or entity has a beneficial interest of 25 percent or more or as to which such person or entity serves as trustee or in a similar fiduciary capacity; or

(D) The spouse, lineal ancestors, lineal descendants, and siblings of the person, as well as each of their spouses.

(2) "Business" means any line of trade or business conducted by the seller or employer, as such terms are defined in this Code section.

(3) "Confidential information" means data and information:

(A) Relating to the business of the employer, regardless of whether the data or information constitutes a trade secret as that term is defined in Code Section 10-1-761;

(B) Disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer;

(C) Having value to the employer;

(D) Not generally known to competitors of the employer; and

(E) Which includes trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information;

provided, however, that such term shall not mean data or information (A) which has been voluntarily disclosed to the public by the employer, except where such public disclosure has been made by the employee without authorization from the employer; (B) which has been independently developed and disclosed by others; or (C) which has otherwise entered the public domain through lawful means.

(4) "Controlling interest" means any equity interest or ownership participation held by a person or entity with respect to a business that accounts for 25 percent or more of the voting rights or profit interest of the business prior to the sale, alone or in combination with the interest or participation held by affiliates of such person or entity.

(5) "Employee" means:

(A) An executive employee;

(B) Research and development personnel or other persons or entities of an employer, including, without limitation, independent

contractors, in possession of confidential information that is important to the business of the employer;

(C) Any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer; or

(D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or a sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements.

Such term shall not include any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information.

(6) "Employer" means any corporation, partnership, proprietorship, or other business organization, whether for profit or not for profit, including, without limitation, any successor in interest to such an entity, who or that conducts business or any person or entity who or that directly or indirectly owns an equity interest or ownership participation in such an entity accounting for 25 percent or more of the voting rights or profit interest of such entity. Such term also means the buyer or seller of a business organization.

(7) "Executive employee" means a member of the board of directors, an officer, a key employee, a manager, or a supervisor of an employer.

(8) "Key employee" means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.

(9) "Legitimate business interest" includes, but is not limited to:

(A) Trade secrets, as defined by Code Section 10-1-761;

(B) Valuable confidential information that otherwise does not qualify as a trade secret;

(C) Substantial relationships with specific prospective or existing customers, patients, vendors, or clients;

(D) Customer, patient, or client good will associated with:

(i) An ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;

(ii) A specific geographic location; or

(iii) A specific marketing or trade area; and

(E) Extraordinary or specialized training.

(10) "Material contact" means the contact between an employee and each customer or potential customer:

(A) With whom or which the employee dealt on behalf of the employer;

(B) Whose dealings with the employer were coordinated or supervised by the employee;

(C) About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or

(D) Who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.

(11) "Modification" means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:

(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and

(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.

(12) "Modify" means to make, to cause, or otherwise to bring about a modification.

(13) "Products or services" means anything of commercial value, including, without limitation, goods; personal, real, or intangible property; services; financial products; business opportunities or as-

sistance; or any other object or aspect of business or the conduct thereof.

(14) "Professional" means an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.

(15) "Restrictive covenant" means an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties, to which the second party has gained access in the course of his or her relationship with the first party or parties, or which the first party or parties has acquired from the second party as the result of a sale. Such restrictive covenants may exist within or ancillary to contracts between or among employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, employers and independent contractors, franchisors and franchisees, and sellers and purchasers of a business or commercial enterprise and any two or more employers. A restrictive covenant shall not include covenants appurtenant to real property.

(16) "Sale" means any sale or transfer of the good will or substantially all of the assets of a business or any sale or transfer of a controlling interest in a business, whether by sale, exchange, redemption, merger, or otherwise.

(17) "Seller" means any person or entity, including any successor-in-interest to such an entity, that is:

(A) An owner of a controlling interest;

(B) An executive employee of the business who receives, at a minimum, consideration in connection with a sale; or

(C) An affiliate of a person or entity described in subparagraph (A) of this paragraph; provided, however, that each sale involving a restrictive covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in the covenant, any entity that directly or indirectly

through one or more affiliates is controlled by or is under common control of such person or entity.

(18) "Termination" means the termination of an employee's engagement with an employer, whether with or without cause, upon the initiative of either party.

(19) "Trade dress" means the distinctive packaging or design of a product that promotes the product and distinguishes it from other products in the marketplace. (Code 1981, § 13-8-51, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U.L. Rev. 21 (2011).

13-8-52. Application.

(a) The provisions of this article shall be applicable only to contracts and agreements between or among:

(1) Employers and employees;

(2) Distributors and manufacturers;

(3) Lessors and lessees;

(4) Partnerships and partners;

(5) Franchisors and franchisees;

(6) Sellers and purchasers of a business or commercial enterprise; and

(7) Two or more employers.

(b) The provisions of this article shall not apply to any contract or agreement not described in subsection (a) of this Code section. (Code 1981, § 13-8-52, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-53. Enforcement of covenants; writing requirement; determining competitive status; effect of failure to comply; time and geographic limitations.

(a) Notwithstanding any other provision of this chapter, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. However, enforcement of contracts that restrict competition after the term of employment, as distinguished from a customer nonsolicitation provision, as described in subsection (b) of this Code section, or a nondisclosure of confidential information provision, as described in

subsection (e) of this Code section, shall not be permitted against any employee who does not, in the course of his or her employment:

(1) Customarily and regularly solicit for the employer customers or prospective customers;

(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;

(3) Perform the following duties:

(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(B) Customarily and regularly direct the work of two or more other employees; and

(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or

(4) Perform the duties of a key employee or of a professional.

(b) Notwithstanding any other provision of this chapter, an employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against "soliciting or attempting to solicit business from customers" or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products or services that are competitive with those provided by the employer's business.

(c)(1) Activities, products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer. Whenever a description of activities, products, or services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy

such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters. In case of a post-employment covenant entered into prior to termination, any good faith estimate of the activities, products, or services, or geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, or services, or geographic areas. The post-employment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products or services actually offered, or the geographic areas actually involved within a reasonable period of time prior to termination.

(2) Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase "of the type conducted, authorized, offered, or provided within two years prior to termination" or similar language containing the same or a lesser time period. The phrase "the territory where the employee is working at the time of termination" or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.

(d) Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.

(e) Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable. (Code 1981, § 13-8-53, enacted by Ga. L. 2011, p. 399, § 4/HB 30; Ga. L. 2012, p. 775, § 13/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (c)(1).

JUDICIAL DECISIONS

Restrictive covenants in non-compete unenforceable. — Because the court had already found that one of the sub-parts of the non-compete was unenforceable under Georgia law, none of the restrictive covenants contained in the non-compete were enforceable. Boone v. Corestaff Support Servs., 805 F. Supp. 2d 1362 (N.D. Ga. 2011).

Because a Georgia House Bill was un-

constitutional and void when it was enacted, the General Assembly did not act to change Georgia's public policy on restrictive covenants in employment contracts. Therefore, a district court did not err in applying Georgia law to find such restrictive covenants in a particular employment contract were unenforceable. Becham v. Synthes USA, No. 11-14495, 2012 U.S. App. LEXIS 11225 (11th Cir. June 4, 2012) (Unpublished).

13-8-54. Judicial construction of covenants.

(a) A court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.

(b) In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible. (Code 1981, § 13-8-54, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-55. Requirements of person seeking enforcement of covenants.

The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable. (Code 1981, § 13-8-55, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-56. Reasonableness determinations restricting competition; presumptions.

In determining the reasonableness of a restrictive covenant that limits or restricts competition during or after the term of an employment or business relationship, the court shall make the following presumptions:

(1) During the term of the relationship, a time period equal to or measured by duration of the parties' business or commercial relationship is reasonable, provided that the reasonableness of a time period

after a term of employment shall be as provided for in Code Section 13-8-57;

(2) A geographic territory which includes the areas in which the employer does business at any time during the parties' relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that:

(A) The total distance encompassed by the provisions of the covenant also is reasonable;

(B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a business or commercial relationship; or

(C) Both subparagraphs (A) and (B) of this paragraph;

(3) The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given; provided, however, that a court shall not refuse to enforce the provisions of a restrictive covenant because the person seeking enforcement establishes evidence that a restrictive covenant has been violated but has not proven that the covenant has been violated as to the entire scope of the prohibited activities of the person seeking enforcement or as to the entire geographic area of the covenant; and

(4) Any restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or geographic area so long as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any potential conflict of interest. (Code 1981, § 13-8-56, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U.L. Rev. 21 (2011).

13-8-57. Reasonableness determinations restricting time; presumptions.

(a) In determining the reasonableness in time of a restrictive covenant sought to be enforced after a term of employment, a court shall apply the rebuttable presumptions provided in this Code section.

(b) In the case of a restrictive covenant sought to be enforced against a former employee and not associated with the sale or ownership of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint two years or less in duration and shall presume to be unreasonable in time any restraint more than two years in duration, measured from the date of the termination of the business relationship.

(c) In the case of a restrictive covenant sought to be enforced against a current or former distributor, dealer, franchisee, lessee of real or personal property, or licensee of a trademark, trade dress, or service mark and not associated with the sale of all or a part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint three years or less in duration and shall presume to be unreasonable in time any restraint more than three years in duration, measured from the date of termination of the business relationship.

(d) In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint the longer of five years or less in duration or equal to the period of time during

which payments are being made to the owner or seller as a result of any sale referred to in this subsection and shall presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection, measured from the date of termination or disposition of such interest. (Code 1981, § 13-8-57, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-58. Enforcement by third parties.

(a) A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract.

(b) In determining the enforceability of a restrictive covenant, it is not a defense that the person seeking enforcement no longer continues in business in the scope of the prohibited activities that is the subject of the action to enforce the restrictive covenant if such discontinuance of business is the result of a violation of the restriction.

(c) A court shall enforce a restrictive covenant by any appropriate and effective remedy available at law or equity, including, but not limited to, temporary and permanent injunctions.

(d) In determining the reasonableness of a restrictive covenant between an employer and an employee, as such term is defined in subparagraphs (A) through (C) of paragraph (5) of Code Section 13-8-51, a court may consider the economic hardship imposed upon an employee by enforcement of the covenant; provided, however, that this subsection shall not apply to contracts or agreements between or among those persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52. (Code 1981, § 13-8-58, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-59. Construction with federal provisions.

Nothing in this article shall be construed or interpreted to allow or to make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of the United States or under the Constitution of this state or of the United States. (Code 1981, § 13-8-59, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

JUDICIAL DECISIONS

Cited in Crump Ins. Servs. v. All Risks, Ltd., 315 Ga. App. 490, 727 S.E.2d 131 (2012).

CHAPTER 10

CONTRACTS FOR PUBLIC WORKS

ARTICLE 1

GENERAL PROVISIONS

Part 1

Bonds

13-10-3. Determining Georgia residency for businesses; preferences; adherence to policies and procedures of State Construction Manual; public works construction contracts.

(a) For the purpose of determining residency under this Code section, a Georgia resident business shall include any business that regularly maintains a place from which business is physically conducted in Georgia for at least one year prior to any bid or proposal submitted pursuant to this Code section or a new business that is domiciled in Georgia which regularly maintains a place from which business is physically conducted in Georgia; provided, however, that a place of business shall not include a post office box, site trailer, or temporary structure.

(b) Whenever the state contracts for the doing of a public work, materialmen, contractors, builders, architects, engineers, and laborers

resident in the State of Georgia are to be granted the same preference over materialmen, contractors, builders, architects, engineers, and laborers resident in another state in the same manner, on the same basis, and to the same extent that preference is granted in awarding bids for the same goods or services by such other state to materialmen, contractors, builders, architects, engineers, and laborers resident in such other state over materialmen, contractors, builders, architects, engineers, and laborers resident in the State of Georgia. However, these requirements shall in no way impair the ability of the state to compare the quality of materials proposed for purchase and to compare the qualifications, character, responsibility, and fitness of materialmen, contractors, builders, architects, engineers, and laborers proposed for employment in its consideration of the purchase of materials or employment of persons. This subsection shall not apply to transportation projects for which federal aid funds are available.

(c) All state agencies, authorities, departments, commissions, boards, and similar entities shall adhere to the policies and procedures contained in the State Construction Manual for project management and procurement of, and contracting for, design, construction, and other project related professional services for all state owned buildings in Georgia funded by state bonds or other state revenue. The State Construction Manual shall be jointly edited and posted on a state website by the Georgia State Financing and Investment Commission and the Board of Regents of the University System of Georgia and shall be updated on a periodic basis to reflect evolving owner needs and industry best practices after consultation with other state agency and industry stakeholders.

(d)(1) To the extent permitted by law, no state agency, authority, department, commission, board, or similar entity that contracts for public works construction shall, in its bid documents, specifications, project agreements, or other controlling documents for a public works construction contract:

(A) Require or prohibit bidders, offerors, contractors, subcontractors, or material suppliers to enter into or adhere to prehire agreements, project labor agreements, collective bargaining agreements, or any other agreement with one or more labor organizations on the same or other related construction projects; or

(B) Discriminate against, or treat differently, bidders, offerors, contractors, subcontractors, or material suppliers for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations on the same or other related construction projects.

(2) Nothing in this subsection shall prohibit bidders, offerors, contractors, subcontractors, or material suppliers from voluntarily

entering into agreements described in paragraph (1) of this subsection.

(3) The head of a governmental entity may exempt a particular public works construction contract from the requirements of any or all of the provisions of paragraph (1) of this subsection if the governmental entity finds, after public notice and a hearing, that special circumstances require an exemption to avert an imminent threat to public health or safety. A finding of special circumstance under this paragraph shall not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more labor organizations or concerning employees on the particular project who are not members of or affiliated with a labor organization. (Code 1981, § 13-10-3, enacted by Ga. L. 2010, p. 308, § 1/SB 447; Ga. L. 2013, p. 628, § 1/SB 179.)

The 2013 amendment, effective May 6, 2013, inserted "of the University System of Georgia" in the last sentence of subsection (c); and added subsection (d).

13-10-4. Limitation on disqualification of bidders upon lack of previous experience.

In awarding contracts based upon sealed competitive bids or sealed competitive proposals, no bidder shall be disqualified from a bid or proposal or denied prequalification based upon a lack of previous experience with a job of the size for which the bid or proposal is being sought if:

(1) The bid or proposal is not more than 30 percent greater in scope or cost from the bidder's previous experience in jobs;

(2) The bidder has experience in performing the work for which bids or proposals are sought; and

(3) The bidder is capable of being bonded by a surety which meets the qualifications of the bid documents for a bid bond, a performance bond, and a payment bond as required for the scope of the work for which the bid or proposal is being sought. (Code 1981, § 13-10-4, enacted by Ga. L. 2013, p. 126, § 1/SB 168.)

Effective date. — This Code section became effective April 24, 2013.

PART 2

BID BONDS

13-10-20. Large public works contracts; requirements for bid bonds; withdrawal of bid.

(a) Bid bonds shall be required for all state public works construction contracts with estimated bids or proposals over $100,000.00; provided, however, that the state or any public board or body of the state may require a bid bond for projects with estimated bids or proposals of $100,000.00 or less.

(b) In the case of competitive sealed bids, except as provided in Code Sections 13-10-22 and 13-10-23, a bid may not be revoked or withdrawn until 60 days after the time set by the state or any public board or body of the state for opening of bids. Upon expiration of such 60 day time period, the bid will cease to be valid, unless the bidder provides written notice to the state prior to the scheduled expiration date that the bid will be extended for a time period specified by the state.

(c) In the case of competitive sealed proposals, the state shall advise offerors in the request for proposals of the number of days that offerors will be required to honor their proposals; provided, however, that if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the state to be unlikely of being selected for contract award shall be released from his or her proposal.

(d) If the state requires a bid bond for any public works construction contract, no bid or proposal for a contract with the state shall be valid for any purpose unless the contractor gives a bid bond with good and sufficient surety or sureties approved by the state. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid or proposal shall be considered if a proper bid bond or other security authorized in Code Section 13-10-21 has not been submitted. The provisions of this subsection shall not apply to any bid or proposal for a contract that is required by law to be accompanied by a proposal guaranty and shall not apply to any bid or proposal for a contract with any public agency or body which receives funding from the United States Department of Transportation and which is primarily engaged in the business of public transportation.

(e) When the state invites competitive sealed proposals for a public works construction project and the request for proposals for such project states that price or project cost will not be a selection or evaluation factor, no bid bond shall be required unless the state provides for a bid bond in the request for proposals and specifies the amount of such bond. (Code 1981, § 13-10-20, enacted by Ga. L. 2001, p. 820, § 1; Ga. L. 2013, p. 628, § 2/SB 179.)

The 2013 amendment, effective May 6, 2013, added subsection (e).

Part 4

Payment Bonds

13-10-62. Notice of commencement.

(a) The contractor furnishing the payment bond or security deposit shall post on the public works construction site and file with the clerk of the superior court in the county in which the site is located a notice of commencement no later than 15 days after the contractor physically commences work on the project and supply a copy of the notice of commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to supply a copy of the notice of commencement within ten calendar days of receipt of the written request from such subcontractor, materialman, or person shall render the provisions of paragraph (1) of subsection (a) of Code Section 13-10-63 inapplicable to such subcontractor, materialman, or person making the request. The notice of commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the public work being constructed or a general description of the improvement;

(3) The name and address of the state or the agency or authority of the state that is contracting for the public works construction;

(4) The name and address of the surety for the performance and payment bonds, if any; and

(5) The name and address of the holder of the security deposit provided, if any.

(b) The failure to file a notice of commencement shall render the notice to the contractor requirements of paragraph (2) of subsection (a) of Code Section 13-10-63 inapplicable.

(c) The clerk of the superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the state and the name of the contractor as contained in the notice of commencement. (Code 1981, § 13-10-62, enacted by Ga. L. 2001, p. 820, § 1; Ga. L. 2013, p. 628, § 3/SB 179.)

The 2013 amendment, effective May 6, 2013, substituted "paragraph (2)" for "paragraph (1)" in subsection (b).

JUDICIAL DECISIONS

No application to public contract for maintenance. — Board of Regents of the University System of Georgia was immune from a suit by employees of a contractor who provided a forged payment bond to the Board; the maintenance contract was not for "public works construction" as defined in O.C.G.A. § 36-91-2(12); therefore, the provisions for payment bonds in O.C.G.A. §§ 13-10-62 and 13-10-63 did not apply. Further, the Board had no duty to investigate the information presented on the face of the payment bond. Bd. of Regents of the Univ. Sys. of Ga. v. Brooks, 324 Ga. App. 15, 749 S.E.2d 23 (2013).

13-10-63. Pursuit of action by person entitled to protection of payment bond; liability of public entity.

Law reviews. — For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010).

JUDICIAL DECISIONS

Forged payment bond. — Board of Regents of the University System of Georgia was immune from a suit by employees of a contractor who provided a forged payment bond to the Board; the maintenance contract was not for "public works construction" as defined in O.C.G.A. § 36-91-2(12); therefore, the provisions for payment bonds in O.C.G.A. §§ 13-10-62 and 13-10-63 did not apply. Further, the Board had no duty to investigate the information presented on the face of the payment bond. Bd. of Regents of the Univ. Sys. of Ga. v. Brooks, 324 Ga. App. 15, 749 S.E.2d 23 (2013).

13-10-65. Time for instituting action.

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

PART 5

PROJECT COMPLETION INCENTIVES IN CONTRACTS

Effective date. — This part became effective May 6, 2013.

13-10-70. Liquidated damages for late completion and incentives for early completion.

Public works construction contracts may include both liquidated damages provisions for late construction project completion and incentive provisions for early construction project completion when the

project schedule is deemed to have value. The terms of the liquidated damages provisions and the incentive provisions shall be established in advance as a part of the construction contract and included within the terms of the bid or proposal. (Code 1981, § 13-10-70, enacted by Ga. L. 2013, p. 628, § 4/SB 179.)

ARTICLE 3

SECURITY AND IMMIGRATION COMPLIANCE

Law reviews. — For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L. J. 1211 (2011).

13-10-90. Definitions.

As used in this article, the term:

(1) "Commissioner" means the Commissioner of Labor.

(2) "Contractor" means a person or entity that enters into a contract for the physical performance of services.

(3) "Federal work authorization program" means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify employment eligibility information of newly hired employees, commonly known as E-Verify, or any subsequent replacement program.

(4) "Physical performance of services" means any performance of labor or services for a public employer using a bidding process or by contract wherein the labor or services exceed $2,499.99; provided, however, that such term shall not include any contract between a public employer and an individual who is licensed pursuant to Title 26 or Title 43 or by the State Bar of Georgia and is in good standing when such contract is for services to be rendered by such individual.

(5) "Public employer" means every department, agency, or instrumentality of this state or a political subdivision of this state.

(6) "Subcontractor" means a person or entity having privity of contract with a contractor, subcontractor, or sub-subcontractor and includes a contract employee or staffing agency.

(7) "Sub-subcontractor" means a person or entity having privity of contract with a subcontractor or privity of contract with another person or entity contracting with a subcontractor or sub-subcontractor. (Code 1981, § 13-10-90, enacted by Ga. L. 2006, p.

105, § 2/SB 529; Ga. L. 2010, p. 308, § 2/SB 447; Ga. L. 2011, p. 794, § 2/HB 87; Ga. L. 2013, p. 111, § 1/SB 160.)

The 2011 amendment, effective July 1, 2011, deleted "the Georgia Department of" following "Commissioner of" in paragraph (1); added paragraph (2); redesignated former paragraphs (2) through (4) as present paragraphs (3) through (6), respectively; in paragraph (3), inserted "employment eligibility" near the end and substituted "commonly known as E-Verify, or any subsequent replacement program" for "pursuant to the Immigration Reform and Control Act of 1986 (IRCA), D.L. 99-603" at the end; in paragraph (4), inserted "within this state" in two places; added "with more than one employee" at the end of paragraph (5); rewrote paragraph (6); and added paragraph (7). See editor's note for applicability.

The 2013 amendment, effective July 1, 2013, deleted "with a public employer" at the end of paragraph (2); rewrote paragraph (4), which read: "'Physical performance of services' means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road; or any other performance of labor for a public employer within this state under a contract or other bidding process."; in paragraph (5), substituted "this state or a political subdivision of this state" for "the state or a political subdivision of the state with more than one employee"; and in paragraph (6), inserted ", subcontractor, or sub-subcontractor".

Editor's notes. — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that the amendment by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Ga. L. 2013, p. 111, § 2/SB 160, not codified by the General Assembly, provides that: "It is the intent of the General Assembly that all public employers and contractors at every tier and level use the federal work authorization program on all projects, jobs, and work resulting from any bid or contract and that every public employer and contractor working for a public employer take all possible steps to ensure that a legal and eligible workforce is utilized in accordance with federal immigration and employment."

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011). For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 173 (2013).

13-10-91. Verification of new employee eligibility; applicability; rules and regulations.

(a) Every public employer, including, but not limited to, every municipality and county, shall register and participate in the federal

work authorization program to verify employment eligibility of all newly hired employees. Upon federal authorization, a public employer shall permanently post the employer's federally issued user identification number and date of authorization, as established by the agreement for authorization, on the employer's website; provided, however, that if a local public employer does not maintain a website, then the local government shall submit such information to the Carl Vinson Institute of Government of the University of Georgia to be posted by the institute on the website created for local government audit and budget reporting. The Carl Vinson Institute of Government of the University of Georgia shall maintain the information submitted and provide instructions and submission guidelines for local governments. State departments, agencies, or instrumentalities may satisfy the requirement of this Code section by posting information required by this Code section on one website maintained and operated by the state.

(b)(1) A public employer shall not enter into a contract for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:

(A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;

(B) The user identification number and date of authorization for the affiant;

(C) The affiant will continue to use the federal work authorization program throughout the contract period; and

(D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

An affidavit required by this subsection shall be considered an open public record once a public employer has entered into a contract for physical performance of services; provided, however, that any information protected from public disclosure by federal law or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained by the public employer for five years from the date of receipt.

(2) A contractor shall not enter into any contract with a public employer for the physical performance of services unless the contractor registers and participates in the federal work authorization program.

(3) A subcontractor shall not enter into any contract with a contractor unless such subcontractor registers and participates in the federal work authorization program. A subcontractor shall submit, at the time of such contract, an affidavit to the contractor in the same manner and with the same information required in paragraph (1) of this subsection. It shall be the duty of any subcontractor receiving an affidavit from a sub-subcontractor to forward notice to the contractor of the receipt, within five business days of receipt, of such affidavit. It shall be the duty of a subcontractor receiving notice of receipt of an affidavit from any sub-subcontractor that has contracted with a sub-subcontractor to forward, within five business days of receipt, a copy of such notice to the contractor.

(4) A sub-subcontractor shall not enter into any contract with a subcontractor or sub-subcontractor unless such sub-subcontractor registers and participates in the federal work authorization program. A sub-subcontractor shall submit, at the time of such contract, an affidavit to the subcontractor or sub-subcontractor with whom such sub-subcontractor has privity of contract, in the same manner and with the same information required in paragraph (1) of this subsection. It shall be the duty of any sub-subcontractor to forward notice of receipt of any affidavit from a sub-subcontractor to the subcontractor or sub-subcontractor with whom such receiving sub-subcontractor has privity of contract.

(5) In lieu of the affidavit required by this subsection, a contractor, subcontractor, or sub-subcontractor who has no employees and does not hire or intend to hire employees for purposes of satisfying or completing the terms and conditions of any part or all of the original contract with the public employer shall instead provide a copy of the state issued driver's license or state issued identification card of such contracting party and a copy of the state issued driver's license or identification card of each independent contractor utilized in the satisfaction of part or all of the original contract with a public employer. A driver's license or identification card shall only be accepted in lieu of an affidavit if it is issued by a state within the United States and such state verifies lawful immigration status prior to issuing a driver's license or identification card. For purposes of satisfying the requirements of this subsection, copies of such driver's license or identification card shall be forwarded to the public employer, contractor, subcontractor, or sub-subcontractor in the same manner as an affidavit and notice of receipt of an affidavit as required by paragraphs (1), (3), and (4) of this subsection. Not later than July 1, 2011, the Attorney General shall provide a list of the states that verify immigration status prior to the issuance of a driver's license or identification card and that only issue licenses or identification cards to persons lawfully present in the United States. The list of verified

state drivers' licenses and identification cards shall be posted on the website of the State Law Department and updated annually thereafter. In the event that a contractor, subcontractor, or sub-subcontractor later determines that he or she will need to hire employees to satisfy or complete the physical performance of services under an applicable contract, then he or she shall first be required to comply with the affidavit requirements of this subsection.

(6) It shall be the duty of the contractor to submit copies of all affidavits, drivers' licenses, and identification cards required pursuant to this subsection to the public employer within five business days of receipt. No later than August 1, 2011, the Departments of Audits and Accounts shall create and post on its website form affidavits for the federal work authorization program. The affidavits shall require fields for the following information: the name of the project, the name of the contractor, subcontractor, or sub-subcontractor, the name of the public employer, and the employment eligibility information required pursuant to this subsection.

(7)(A) Public employers subject to the requirements of this subsection shall provide an annual report to the Department of Audits and Accounts pursuant to Code Section 50-36-4 as proof of compliance with this subsection. Subject to available funding, the state auditor shall conduct annual compliance audits on a minimum of at least one-half of the reporting agencies and publish the results of such audits annually on the Department of Audits and Accounts' website on or before September 30.

(B) If the state auditor finds a political subdivision to be in violation of this subsection, such political subdivision shall be provided 30 days to demonstrate to the state auditor that such political subdivision has corrected all deficiencies and is in compliance with this subsection. If, after 30 days, the political subdivision has failed to correct all deficiencies, such political subdivision shall be excluded from the list of qualified local governments under Chapter 8 of Title 50 until such time as the political subdivision demonstrates to the state auditor that such political subdivision has corrected all deficiencies and is in compliance with this subsection.

(C)(i) At any time after the state auditor finds a political subdivision to be in violation of this subsection, such political subdivision may seek administrative relief through the Office of State Administrative Hearings. If a political subdivision seeks administrative relief, the time for correcting deficiencies shall be tolled, and any action to exclude the political subdivision from the list of qualified governments under Chapter 8 of Title 50 shall be suspended until such time as a final ruling upholding the findings of the state auditor is issued.

(ii) A new compliance report submitted to the state auditor by the political subdivision shall be deemed satisfactory and shall correct the prior deficient compliance report so long as the new report fully complies with this subsection.

(iii) No political subdivision of this state shall be found to be in violation of this subsection by the state auditor as a result of any actions of a county constitutional officer.

(D) If the state auditor finds any political subdivision which is a state department or agency to be in violation of the provisions of this subsection twice in a five-year period, the funds appropriated to such state department or agency for the fiscal year following the year in which the agency was found to be in violation for the second time shall be not greater than 90 percent of the amount so appropriated in the second year of such noncompliance. Any political subdivision found to be in violation of the provisions of this subsection shall be listed on www.open.georgia.gov or another official state website with an indication and explanation of each violation.

(8) Contingent upon appropriation or approval of necessary funding and in order to verify compliance with the provisions of this subsection, each year the Commissioner shall conduct no fewer than 100 random audits of public employers and contractors or may conduct such an audit upon reasonable grounds to suspect a violation of this subsection. The results of the audits shall be published on the www.open.georgia.gov website and on the Georgia Department of Labor's website no later than December 31 of each year. The Georgia Department of Labor shall seek funding from the United States Secretary of Labor to the extent such funding is available.

(9) Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement in an affidavit submitted pursuant to this subsection shall be guilty of a violation of Code Section 16-10-20 and, upon conviction, shall be punished as provided in such Code section. Contractors, subcontractors, sub-subcontractors, and any person convicted for false statements based on a violation of this subsection shall be prohibited from bidding on or entering into any public contract for 12 months following such conviction. A contractor, subcontractor, or sub-subcontractor that has been found by the Commissioner to have violated this subsection shall be listed by the Department of Labor on www.open.georgia.gov or other official website of the state with public information regarding such violation, including the identity of the violator, the nature of the contract, and the date of conviction. A public employee, contractor, subcontractor, or sub-subcontractor shall not be held civilly liable or criminally responsible for unknowingly or unintentionally accepting a bid from or

contracting with a contractor, subcontractor, or sub-subcontractor acting in violation of this subsection. Any contractor, subcontractor, or sub-subcontractor found by the Commissioner to have violated this subsection shall, on a second or subsequent violations, be prohibited from bidding on or entering into any public contract for 12 months following the date of such finding.

(10) There shall be a rebuttable presumption that a public employer, contractor, subcontractor, or sub-subcontractor receiving and acting upon an affidavit conforming to the content requirements of this subsection does so in good faith, and such public employer, contractor, subcontractor, or sub-subcontractor may rely upon such affidavit as being true and correct. The affidavit shall be admissible in any court of law for the purpose of establishing such presumption.

(11) Documents required by this Code section may be submitted electronically, provided the submission complies with Chapter 12 of Title 10.

(c) This Code section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

(d) Except as provided in subsection (e) of this Code section, the Commissioner shall prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this Code section and publish such rules and regulations on the Georgia Department of Labor's website.

(e) The commissioner of the Georgia Department of Transportation shall prescribe all forms and promulgate rules and regulations deemed necessary for the application of this Code section to any contract or agreement relating to public transportation and shall publish such rules and regulations on the Georgia Department of Transportation's website.

(f) No employer or agency or political subdivision, as such term is defined in Code Section 50-36-1, shall be subject to lawsuit or liability arising from any act to comply with the requirements of this Code section. (Code 1981, § 13-10-91, enacted by Ga. L. 2006, p. 105, § 2/SB 529; Ga. L. 2009, p. 970, § 1/HB 2; Ga. L. 2010, p. 308, § 2.A/SB 447; Ga. L. 2011, p. 794, § 3/HB 87; Ga. L. 2013, p. 111, § 3/SB 160.)

The 2011 amendment, effective July 1, 2011, in subsection (a), substituted "then the local government shall submit such information to the Carl Vinson Institute of Government of the University of Georgia to be posted by the institute on the website created for local government audit and budget reporting" for "the identification number and date of authorization shall be published annually in the official legal organ for the county" at the end of the second sentence and added the third sentence; in the first sentence of paragraph (b)(1), substituted "A public" for "No public", inserted "not", deleted "within this state" following "performance of services", and deleted "to verify information of all newly hired employees or

subcontractors" following "authorization program"; in subparagraph (b)(1)(A), substituted a comma for "and" and inserted ", and uses"; deleted "and" at the end of subparagraph (b)(1)(B); in subparagraph (b)(1)(C), deleted "is using and" following "The affiant" at the beginning and added "; and" at the end; added subparagraph (b)(1)(D); substituted the present provisions of paragraph (b)(2) for the former provisions, which read: "No contractor or subcontractor who enters a contract pursuant to this chapter with a public employer or a contractor of a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the federal work authorization program to verify information of all newly hired employees. Any employee, contractor, or subcontractor of such contractor or subcontractor shall also be required to satisfy the requirements of this paragraph."; substituted the present provisions of paragraph (b)(3) for the former provisions, which read: "Upon contracting with a new subcontractor, a contractor or subcontractor shall, as a condition of any contract or subcontract entered into pursuant to this chapter, provide a public employer with notice of the identity of any and all subsequent subcontractors hired or contracted by that contractor or subcontractor. Such notice shall be provided within five business days of entering into a contract or agreement for hire with any subcontractor. Such notice shall include an affidavit from each subsequent contractor attesting to the subcontractor's name, address, user identification number, and date of authorization to use the federal work authorization program."; added paragraphs (b)(4) through (b)(7); redesignated former paragraphs (b)(4) and (b)(5) as present paragraphs (b)(8) and (b)(9), respectively; added "or may conduct such an audit upon reasonable grounds to suspect a violation of this subsection" at the end of the first sentence in paragraph (b)(8); in paragraph (b)(9), in the second sentence, substituted a comma for "and" and inserted "sub-subcontractors, and any person", and added the third through fifth sentences; and added paragraphs (b)(10) and (b)(11). See editor's note for applicability.

The 2013 amendment, effective July 1, 2013, in the introductory paragraph of paragraph (b)(1), deleted "pursuant to this chapter" following "into a contract" in the first sentence; in subparagraph (b)(7)(A), deleted the former first and second sentences, which read: "Not later than December 31 of each year, a public employer shall submit a compliance report to the state auditor certifying compliance with the provisions of this subsection. Such compliance report shall contain the public employer's federal work authorization program verification user number and date of authorization and the legal name, address, and federal work authorization program user number of the contractor and the date of the contract between the contractor and public employer.", added the present first sentence, and substituted "Department of Audits and Accounts'" for "department's" near the end of the second sentence.

Editor's notes. — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that the amendment by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Ga. L. 2013, p. 111, § 2/SB 160, not codified by the General Assembly, provides that: "It is the intent of the General Assembly that all public employers and contractors at every tier and level use the federal work authorization program on all projects, jobs, and work resulting from any bid or contract and that every public employer and contractor working for a public employer take all possible steps to ensure that a legal and eligible workforce is utilized in accordance with federal immigration and employment."

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011). For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 173 (2013). For annual survey on labor and employment law, see 65 Mercer L. Rev. 157 (2013).

For comment, "Aliens in a Foreign Field: Examining Whether States have the Authority to Pass Legislation in the Field of Immigration Law," see 63 Mercer L. Rev. 1077 (2012).

CHAPTER 11

PROMPT PAYMENT

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

13-11-1. Short title.

Law reviews. — For annual survey on admiralty, see 62 Mercer L. Rev. 1053 (2011).

13-11-2. Definitions.

JUDICIAL DECISIONS

"Contractor". — Given that an owner had an interest in the real property where the contractor performed the improvements and that the owner ordered the improvements to be made, the contractor was a "contractor" under the Prompt Pay Act, O.C.G.A. § 13-11-2, and entitled to attorney's fees and postjudgment interest against the owner under O.C.G.A. § 13-11-8. No showing of bad faith was required. Elec. Works CMA, Inc. v. Baldwin Tech. Fabrics, LLC, 306 Ga. App. 705, 703 S.E.2d 124 (2010).

13-11-8. Attorneys' fees.

JUDICIAL DECISIONS

Award of fees to contractor appropriate. — Given that an owner had an interest in the real property where the contractor performed the improvements and that the owner ordered the improvements to be made, the contractor was a "contractor" under the Prompt Pay Act, O.C.G.A. § 13-11-2 and entitled to attor-

ney's fees and postjudgment interest against the owner under O.C.G.A. § 13-11-8. No showing of bad faith was required. Elec. Works CMA, Inc. v. Baldwin Tech. Fabrics, LLC, 306 Ga. App. 705, 703 S.E.2d 124 (2010).

CHAPTER 12

AUTOMATIC RENEWAL PROVISIONS

Effective date. — This chapter became effective July 1, 2013. See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 1046, § 2/HB 234, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2013, and shall apply only to contracts entered into on or after that date."

13-12-1. Definitions.

As used in this chapter, the term:

(1) "Automatic renewal provision" means a provision under which a service contract is renewed for a specified period of more than one month if the renewal causes the service contract to be in effect more than six months after the day of the initiation of the service contract. Such renewal is effective unless the consumer gives notice to the seller of the consumer's intention to terminate the service contract.

(2) "Consumer" means a natural person or a nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 receiving service, maintenance, or repair benefits under a service contract. The term does not include a natural person engaged in business or employed by or otherwise acting on behalf of a governmental entity if the person enters into the service contract as part of or ancillary to the person's business activities or on behalf of the business or governmental entity.

(3) "Seller" means any person, firm, partnership, association, or corporation engaged in commerce that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract.

(4) "Service contract" means a written contract for the performance of services for a specified period of time. (Code 1981, § 13-12-1, enacted by Ga. L. 2013, p. 1046, § 1/HB 234.)

13-12-2. Disclosure to consumer of automatic renewal provision in contract or contract offer.

Any seller that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract that has an automatic renewal provision shall disclose the automatic renewal provision clearly and conspicuously in the contract or contract offer. (Code 1981, § 13-12-2, enacted by Ga. L. 2013, p. 1046, § 1/HB 234.)

13-12-3. Notice to consumer prior to automatic renewal of a service contract.

Any seller that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract for a specified period of 12 months or more and that automatically renews for a specified period of more than one month, unless the consumer cancels the contract, shall provide the consumer with written or electronic notification of the automatic renewal provision. Notification shall be provided to the consumer no less than 30 days or no more than 60 days before the cancellation deadline pursuant to the automatic renewal provision. Such notification shall disclose clearly and conspicuously:

(1) That unless the consumer cancels the contract, the contract will automatically renew; and

(2) The methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, including contacting the seller at a specified telephone number or address, referring to the contract, or any other method. (Code 1981, § 13-12-3, enacted by Ga. L. 2013, p. 1046, § 1/HB 234.)

13-12-4. Applicability.

This chapter shall not apply to:

(1) A financial institution as provided in Chapter 1 or 2 of Title 7 or any depository institution as defined in 12 U.S.C. Section 1813(c)(2);

(2) A foreign bank maintaining a branch or agency licensed under the laws of any state of the United States;

(3) Any subsidiary or affiliate of an entity provided in paragraph (1) or (2) of this Code section;

(4) Any electric utility as provided in Chapter 3 of Title 46;

(5) Any entity regulated pursuant to Chapter 45 of Title 43; or

(6) Any county, municipal corporation, authority, or local government or governing body. (Code 1981, § 13-12-4, enacted by Ga. L. 2013, p. 1046, § 1/HB 234.)

13-12-5. Violation of chapter.

A violation of this chapter renders the automatic renewal provision of a contract void and unenforceable. (Code 1981, § 13-12-5, enacted by Ga. L. 2013, p. 1046, § 1/HB 234.)